

The Swedish Gambling Monopoly in Perspective of EC- law

Master Thesis for the Masters of Law program
(Tillämpade studier, 20 poäng)

Department of Law
School of Economics and Commercial Law
Gothenburg University, December 2005

Author
Bobi Mitrović

Supervisor
Thomas Erhag

Some people refer to it as “gaming”; others refer to it as “gambling”. The mere fact of what you call it, could reveal your standpoint and it reminds me of the philosophical thesis whether the glass is half full, or half empty. The truth lies in the eyes of the beholder.

Abstract

The European Community is based upon the principle of free movement of the four freedoms, and aims to create *one* internal in which measures of harmonization are utilized. Thus, principally, a monopoly as the Swedish gambling monopoly is contrary to this objective. Nonetheless, the Treaty on the European Union provides derogations based on public policy, public security and public health. Gambling has, so far, not been the object of any harmonization initiative within the European Union.

In brief, the rulings of the European Court of Justice have shown that the national monopolies are indeed infringing on European Law, and it was not until in *Schindler* these arguments were developed for the first time in connection with gambling services. However, no violation will be established if a restrictive legislation can be justified by objectives of social policy and consumer protection aimed at limiting the harmful effects of gambling activities, and if the restrictions are non-discriminatory and proportionate to these objectives. Moreover, according to *Gambelli*, the raising of money for good causes cannot in itself justify a restrictive policy. The case also pointed out that the national gambling restrictions are only acceptable according to the Treaty if they reflect a concern to bring about a genuine diminution in gambling opportunities and if the financing of good causes, or of the state, constitutes an incidental beneficial consequence. The Member States have so far enjoyed a large discretionary power in regulating gambling, but the discretionary power is not limited by the fact that other Member States have regulated games of chance in a more liberal way. Since it is for the national court to determine whether the legislation serves the aims which might justify it and if it is proportional, different national courts have been making different interpretations.

Many gambling monopolies today act more like a private business rather than a company with a public health mandate. In order to avoid risking dissolution of monopolistic structures, the state authorized companies may have to modify or perhaps withdraw from certain areas, products or marketing campaigns. In the light of recent cases in national courts of Holland and Germany, it appears that a state which actively seeks to stimulate demand for gambling products, either through the development of new gambling games; the opening up of new channels of distribution; or the roll out of aggressive marketing campaigns, could have some difficulty justifying its national gambling restrictions. The Swedish gambling monopoly has, so far by the Swedish Courts, not been seen as one of those; however there are strong indications pointing towards the opposite.

The focus has increasingly ended up on legal interpretations around the possibilities of, and the obstacles for, state regulation and has recently placed Nordic gambling monopolies under scrutiny. Most of the Nordic countries are under pressure as private operators have instigated objections against the state monopolies in several jurisdictions.

Table of Contents

CHAPTER I	7
INTRODUCTION	7
1.1 Background.....	7
1.2 Purpose and Questions of Research	8
1.3 Delimitations.....	9
1.4 Method.....	9
1.5 Disposition	9
CHAPTER II	10
EUROPEAN FRAMEWORK	10
2.1 Background.....	10
2.2 The Core of the European Community	11
2.3 Legal Principles	11
2.3.1 Principle of Non Discrimination	12
2.3.2 Principle of Proportionality	12
2.4 Competition Law and State Monopolies	13
2.5 Free Movement of Services	13
2.6 Freedom of Establishment.....	15
2.6.1 Exceptions	15
2.6.2 Principle of Overriding Reasons of General Interest	16
2.7 Proposal of Service Directive.....	17
2.8 Directive on E-Commerce.....	18
2.9 European Case Law on Gambling	19
2.9.1 Schindler	19
2.9.2 Läära	21
2.9.3 Zenatti	22
2.9.4 Anomar	23
2.9.5 Gambelli	24
2.9.6 Opinion of Advocate General Siegbert Alber	26
2.9.7 Lindman	27
2.10 Aftermath of Gambelli.....	28

CHAPTER III	32
SWEDISH FRAMEWORK	32
3.1 Background.....	32
3.2 The Swedish Monopoly	32
3.3 National Legislation.....	33
3.3.1 Lottery Act	33
3.4 Swedish Gambling Monopoly under Scrutiny	34
3.5 Swedish Case Law on Gambling.....	35
3.5.1 Case 5819-01	35
3.5.2 Case 7119-01	37
3.5.3 Case 3841-04	37
3.5.4 Case Ö 4474-04	38
3.6 Predicaments of the Swedish Gambling Monopoly – Gambling Companies v. the State.....	38
3.6.1 Market Activities	38
3.6.2 New Products	41
3.6.3 Legislative Measures	42
CHAPTER IV	45
ANALYSIS.....	45
4.1 Applicability of an Activity with EC-law	45
4.1.1 Does the Regulation Concerned Relate to an Economic Activity?	45
4.1.2 Does the Economic Activity Relate to the Free Provision of Services or Goods?	46
4.1.3 If there is a Restriction in Place, is it Discriminating?.....	47
4.1.4 Is the Restriction Justified?	47
4.1.5 Is the Restriction Necessary and Proportionate?	48
4.2 European Case Law.....	51
4.3 Clarifying Gambelli.....	51
4.3.1 Guidelines Narrowing the Scope of Interpretation	51
4.3.2 A slight Shift in the Burden of Proof	53
4.4 Swedish Case Law	54
4.5 The Lottery Act.....	54
4.6 Answering the Questions of Research.....	55
5 LIST OF REFERENCES	58

APPENDIX A – DISPERSION OF THE SWEDISH GAMBLING AND LOTTERY MARKET	58
APPENDIX B – PRODUCTS OFFERED BY SVENSKA SPEL.....	58
APPENDIX C – PRODUCTS OFFERED BY ATG.....	58
APPENDIX D – SUBVENTION IN THE WORK AGAINST GAMBLING ADDICTION IN RELATION TO MEASURES PREVENTING ALCOHOL AND NARCOTICS.....	58

CHAPTER I

Introduction

1.1 Background

Internet gambling companies are, to this date, a small group of companies that have managed to sustain profitable beyond the so called “Internet bubble”. Not many years ago, investors were throwing money at “dot.com companies” that were nothing more than a business plan predicting future profits in correlation with the projected increased Internet access throughout the world. The ever-expanding accessibility of the Internet has led to increasing opportunities for gambling and, in particular, cross-border gambling. This growth continues with limited, if any, support from many governments throughout the world in the form of effective regulatory schemes. In most of the European jurisdictions, gambling is strictly controlled by the national governments. National gambling monopolies exist in several countries. This means that the same hand supplying gambling is regulating it. At the same time the monopolistic structure of gambling is being questioned, both on the national and international arena, due to an increased pressure of general deregulation and harmonization within the European Union.

In Sweden, ATG and Svenska Spel AB, has a concession¹ to provide gambling services according to the Lotteries Act. As a result, they can dictate price, supply and all other relevant conditions concerning their offer. Moreover, there is a lot of money to be made without competition, approximately € 75 billions in annual turnover in Europe², even though this industry, for the first time in years, is facing decreased growth. Further, it has been noted that Internet poker has increased 600 percent during the period November, 2003 to November, 2004.³

¹ This permission is given by the Swedish government according to the Lottery Act.

² Ayolt Z., (2005).

³ 2005/06:KrU3.

One of the European Union's main objectives is to create *one* internal market. On one hand, the state owned companies, or the Member States to be precise, do not want one European market in this aspect. On the other hand, gambling companies such as Ladbrokes, Unibet, Betfair etc wants a piece of the billion Euro market. Member states argue that gambling must be state controlled in order to secure the protection of general interests, such as, public policy, public security and public health. Gambling companies argue that the Member States are benefiting their public purses and that gambling companies could shield many of the general interests asserted by the Member States. Actually, in comparison to alcohol for example, there are far more countries that have some kind of regulated gambling market with the stated purpose of protecting citizens from harm, restricting criminal behaviour and for the purpose of financially benefiting public interest.

The focus has increasingly ended up on legal interpretations around the possibilities of, and the obstacles for, state regulation and has recently placed Nordic gambling monopolies under scrutiny. Most of the Nordic countries are under pressure as private operators have instigated objections against the state monopolies in several jurisdictions.

The European Union has addressed the need for legislative action to avoid future distortions of the internal market by initiating the so called "Report on gambling" (planned publishing November 2005), reviewing the E-commerce Directive for the second time as well as debating the proposal for a Services Directive in the European Parliament (January, 2006). Any subsequent legislative proposal in this field will be the result of a complex debate between the diverging interests of the European Union, national monopolies and private operators; the balance between the defence and promotion of the freedom to provide services in the internal market, the loss of revenues or jobs in the industry and the need to combat fraud and money laundering, prevent gambling addiction and protect consumers.

1.2 Purpose and Questions of Research

This paper, intends to discuss the European Community regulations that concern the Swedish gambling monopoly. Most important aspects of the Treaty are the freedom to provide services and the freedom of establishment. The objective with this paper is to answer following questions:

1. What is the law in force concerning gambling monopolies within the European Community and Sweden respectively?
2. Is the Swedish monopoly in breach of any provision(s) of the Treaty?
 - a) If affirmative, can it/they be justified?
3. Under what circumstances could the monopoly continue to exist?
4. What circumstances could undermine the monopoly?

1.3 Delimitations

I have delimited this paper to apply law in force on the Swedish gambling monopoly. I will not enter deeply into the Member States' national regulations or into the regulatory discrepancies between them within the European Community, except for when it is necessary in order to understand a case or an argumentation etcetera. The purpose is not to elaborate other Member States' law in force. However, by looking at the oddity among the Member States' regulations, one can enlighten and understand the case law within the European Community. A relevant question, more of a formal nature, is when a national Court should be obliged to refer a matter to the European Court of Justice, but it will briefly be addressed. For purpose of this paper, the questions set forth in this report will be examined through the supranational approach, which means that the Swedish gambling monopoly is imposed EC-law, and could very likely be considered in breach of the same. The opposite approach, the interstate approach regards the Member States as the masters of the Treaty, whereby the questions set forth in this report would not even be an issue.

1.4 Method

In order to answer the proposed questions, I have studied the Treaty, Directives and proposals of the same, Commission reports as well as other sources from the European Community. Additionally, since the regulatory framework has proven insufficient, the European Court of Justice has some case law in this question. In conjunction to this, national European case law has been examined too. Most of the facts of company nature have been acquired from public documentations and appreciations, since some of the most interesting facts, very little surprising, are confidential.

1.5 Disposition

This paper is predisposed as follows. Chapter II explains the European framework and its purpose is to elucidate the law in force within Europe. This will be conducted by examining the Directives and proposals of Services and E-commerce. In addition, the European case law will thoroughly be examined. Chapter III addresses the Swedish framework and constitutes the background for the questions of research. In Chapter IV an analysis is made whether the Swedish gambling monopoly is in conjunction with, or in breach of, the Treaty on the European Union/ Community. In this last chapter, the questions set forth in this report will be answered as well.

CHAPTER II

European Framework

2.1 Background

Already in the early 1990s, the European Commission (hereinafter the Commission) demonstrated a certain interest in the “gambling sector” since its substantial economic importance and potential.⁴ The Member States were of the opinion that the regulation of casino games, lotteries and other types of games was an exclusive Member State’s matter. When the Commission, in 1992, first addressed a European gambling regulation it underlined that a legislative initiative could not be excluded, even if it was not required. Given the fact that technological developments open up markets worldwide and the Community becomes ever more closely integrated, it could not be precluded that the Commission will have to reconsider its position in view of new and as yet unforeseeable trends.⁵ The wording “unforeseeable trends” aims at the information society, most manifestly demonstrated by the growth of the Internet, a society, as we all know, without geographical frontiers.

In the view of most governmental regulators, online gambling is probably the wild wild west of the gambling world. Online or Internet gambling is largely unregulated, and in fact illegal in many countries. There are basically three distinct regulatory schemes for Internet gambling.⁶ The first scheme, practised by countries like the United States and Switzerland, is to outlaw Internet gambling, because Internet gambling undermines gambling policies, may compete with state lotteries, and cannot be easily taxed.⁷ Other countries, like Great Britain and Australia have taken a different approach by expressly authorizing gambling, controlling it, and taxing it.⁸

⁴ IP (91)904.

⁵ IP (92)1120.

⁶ See Fridolin W., (2000).

⁷ Ibid.

⁸ Ibid.

Under a third type of approach, many European countries throw moralistic concerns to the wind by running their own gambling concessions. Gambling is a good example of how different the point of attacks can be between countries.

Since March 7, 2001, Great Britain has essentially been the pioneer of the global gambling industry. The move was to dump the tax on sports betting in exchange for a pledge by its famed bookmakers to shut down their offshore Internet operations and reopen them at home. The change of the tax code made Britain the first world power to embrace Internet gambling.⁹

2.2 The Core of the European Community

The European Union (hereinafter the EU) was founded to avoid future similar incidents to the world wars, and by political and economical unification, the EU seeks to attain long and prosperous peace. Sweden became a member of the EU January 1, 1995 and has ever since been resigned to EC-law¹⁰. The European Union embraces more than the economical field but in this regard, by looking at gambling as an activity, it must be considered to have an economical impact in order to be affected by the Treaty. Hence, the question if the activity is economical will therefore be the first step in the analysis of this paper, see section 4.1.1 Does the Regulation Concerned Relate to an Economic Activity.

Fundamental to the European Community (hereinafter the EC) is to have *one* internal market whereas goods, persons, services and capital can move freely across the national borders within the EC. All obstacles to competition, establishment, providing and receiving the freedoms, are aimed to be overcome. However, wherever there are main rules, there are exceptions as well. In this chapter, I will emphasize on the European case law since it is the single most important source of law regarding gambling.

2.3 Legal Principles

There are some fundamental legal principles within the EC-law, to which the European Court of Justice often refers. As the Treaty has many loopholes, these principles constitute a very important tool in the interpretation. In order to understand the case law later in this chapter, the basic and most relevant legal principles will be outlined. The general legal principles that derive from the Treaty are the principles of legality, loyalty, non discrimination equality, subsidiarity and proportionality. Principle derived by case law is the principle of overriding reasons; see section 2.6.2 Principle of Overriding Reasons of General Interest.

⁹ Brunker, M., (2004).

¹⁰ The four freedoms (free movement of goods, persons, services and capital or sometimes even five when referring to the freedom of establishment) derive from the EC-Treaty. The EC-Treaty derives from EEC (European Economic Community), ECSC (European Coal and Steel Community) and Euratom (Treaty on atom energy). The Union structure fashioned at Maastricht is built on three pillars whereas the European Communities are one of those three. The other two are: CFSP (Common Foreign and Security Policy) and JHA (Cooperation in the Fields of Justice and Home Affairs).

2.3.1 Principle of Non Discrimination

The principle of non discrimination implies that every attempt to discriminate based on nationality is prohibited and it is expressed in article 12 of the Treaty. It states that natural and legal person of a Member State shall be treated as residents and companies in other Member States. ECJ has several times stated the Treaty not only to prohibit direct (open) discrimination, but also indirect (hidden) discrimination and the latter can be manifested through illusionary regulations not targeting at nationality, but for instance unjustified requirements of settlement or language. Therefore, this is one of the cornerstones of the EC striving for an internal market which is based upon an open market economy with free competition. The discriminating effect of an indirect discrimination can however be considered as a merely accidental occurrence if the negative effect is objective in proportion to its aim and based on other than the nationality of the effected economical activity.¹¹

2.3.2 Principle of Proportionality

This principle is elucidated in article 5.3 of the Treaty whereas “*(A)ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.*” It means that actions taken by EC institutions, to achieve a certain objective, are not to be more burdensome or far-reaching than necessary for achieving the objective.¹² In the event of choosing from several actions striving to achieve an objective, the least burdensome should be chosen.¹³ The principle expresses a balance between means and objectives, and ECJ often refers to the phrase “*appropriate and necessary*”.

Actions prohibiting gambling services must be considered proportional in order for the Member States to continue to keep their trade barriers. However, there is some uncertainty regarding what the principle really constitutes of and how it should be conducted. In some cases, the ECJ have chosen to conduct a more limited proportionality test than in other cases. The criteria have varied between one and three, and between an alternative and cumulative formulation¹⁴, but have been considered to be of little practical significance since the Court usually makes a collected assessment and very seldom on the very single criteria.¹⁵

An extensive test, however, comprises of three questions¹⁶: (1) Is the action suitable or appropriate to achieve the objective it pursues? This question pertains to causality by which there has to be a connection between the means and the ends. (2) Is the action necessary in order to achieve the objective? The objective of the measure must not be capable of being achieved by alternative means that are less restrictive.

¹¹ Bernitz, U. and Kjellgren A. (2002), p. 229.

¹² Snell, J (2002), p. 200 and de Burca, G. and Craig, P. (2003), p. 816 and Bernitz, U. (2002), p. 115.

¹³ Ibid.

¹⁴ Eriksson, I. O. (2003), p. 587.

¹⁵ Hettne, J and Eriksson I. O. (2005), p. 156, and Meyrowitch, A., Allroth, E. and Hettne, J (2005) p. 56-57.

¹⁶ Hettne, J and Eriksson I. O. (2005) p. 155 and Snell, J (2002), p. 196, 198 and 200.

(3) Is the action in reasonable proportion to the objective? This question targets the Court to conduct a cost-benefit analysis of the regulation by weighting the national interest against the Community interest of free trade.

2.4 Competition Law and State Monopolies

The provisions of competition are applicable to gambling monopolies. Article 81 prohibits limitations of competitive measures while article 82 prohibits abuse of dominant position. Further, article 86.1 prohibits Member States from enacting or maintaining any measures in force, contrary to the provisions in the Treaty, in the case of public undertakings and undertakings to which Member States have granted special or exclusive rights. The activity in question must be of an economic nature and any public body carrying on an economic activity is considered as an undertaking.¹⁷ The borderline between economic and non-economic activities is sometimes difficult to draw in the public sector, as activities, such as health, social security and education have a diffuse status. However, gambling activities are clearly of an economic nature.¹⁸ ECJ has established that a monopoly can be incoherent with EC-law¹⁹ since it is not implied that all rights are coherent with EC-law, as article 86.1 depend upon provisions it is referring to.²⁰ The mere grant of exclusive rights is normally not considered in quarrel with the Treaty, unless it is constructed in a way unable to avoid breaching article 86 through the practise of the monopoly, for example by abusing its dominating position.²¹ Nevertheless, an exception is given, in article 86.2, to monopoly undertakings running operation of *services of general interest* or to those which have the character of a *revenue-producing monopoly*, as these are considered entrusted with a particular task important enough to safeguard. These are imposed the provisions of competition, but only to an extent where the provisions do not restrain them from completing their assigned task. Gambling companies are considered as revenue-producing undertakings and it is implied that the undertakings take advantage of their special or exclusive rights to provide income to the state.²² However, the development of trade cannot under any circumstances be affected contrary to the interest of the EC. Hence, the main question is whether the development of trade is affected through the freedom to provide services and the freedom of establishment, which constitute the development of trade.

2.5 Free Movement of Services

One of the basic freedoms is declared in article 49 - the freedom to provide services. The article states that *“(W)ithin the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be*

¹⁷ Korah, V. (2000), p. 149.

¹⁸ Faull, J and Nikpay, A. (1999), p. 279-280.

¹⁹ C-393/92, *Almelo* and C-320/91, *Corbeau*.

²⁰ C-202/88, *France/Commission*.

²¹ SOU 2000:50 p. 130.

²² Allgård. O. and Norberg S. (2004), p. 292, especially footnote 87.

prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". Not only is any discrimination on grounds of nationality prohibited, but also any restriction on, or obstacle to, the freedom to provide services, even if they apply without distinction to national providers of services and to those established in other Member States.²³

Restrictions are only allowed to be imposed and maintained by Member States, provided that no distinctions are made on grounds of nationality or residence, if they can be justified by exemptions provided by EC-law. The prohibition is relating to direct and indirect discrimination of foreign services provided on the concerned national markets, but can also enact to the adoption of non-discriminatory rules to foreign services.²⁴ Further, article 49 also impedes restrictions imposed a provider of services established in another Member State where he is authorized to provide that service.²⁵

In article 50 the definition of *a service* is given. "*Services shall be considered to be services within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*" This explains why the ECJ always inquires if the question concerns the movement for goods, capital or persons, before it can conclude the activity as a service.

In *Schindler*²⁶, the Court concluded lottery activities to fall within the scope of *services* and not *goods*.²⁷ This distinction constitutes the second step in the analysis, see section 4.1.2 Does the Economic Activity Relate to the Free Provision of Services or Goods?

Seeing that services play a larger role in the information economy than goods, it is also a more apt area for the ECJ to uphold national restrictions. The reasons for this are that national measures can be of a more variety and the restrictions are often of another nature than strictly protectionist, as oppose to the nature of goods.²⁸ In practise, the free movement have not come as far for services as for goods.²⁹ A total of 70 percent of the Member States' GNP is comprised by services, but only 20 percent constitutes the trading between them.³⁰

²³ C- 42/ 02, *Lindman* paragraph 20.

²⁴ de Burka, G. and Craig, P. (2003), p. 803. See also Case 110/ 78, *Van Wesemael*; Case 279/ 80, *Webb*, Opinion of Advocate General Slyn; Case C- 154/ 89, *Commission/ France*, Opinion of Advocate General Lenz and Case C- 180/ 89, *Commission/ Italy*.

²⁵ Case C- 76/ 90, *Saeger*, Opinion of Advocate General Jacobs, paragraph 12.

²⁶ C- 275/ 92, *Schindler*.

²⁷ Ibid, paragraph 25.

²⁸ Bernitz, U. and Kjellgren, A. (2002), p. 229- 230.

²⁹ Bernitz, U. (2005) p. 25.

³⁰ COM(2002)441 final.

2.6 Freedom of Establishment

Establishment, which is sometimes referred to as the fifth freedom, is described in article 43 as the pursuit of business and free movement for the self-employed. *“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions in the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.”*

This provision gives EC nationals, both natural and legal persons, the right to set up a business in a Member State other than their own. The right comprises to set up a permanent base if so is desired whilst the freedom to provide services is seen as a temporary right which does not necessarily involve residence. The difference between the right of establishment and the right to provide services is one of degree rather than of kind.³¹ According to *Gebhard*³², a person can be established in more than one Member State, especially as companies are setting up branches or subsidiaries, and members of a profession are establishing a second professional base.³³

The question of establishment, in a gambling case, was for the first time examined in *Gambelli* (see 2.9.5 Gambelli) since it had not been adduced in prior case law, even though circumstances were at hand (see 2.9.3 Zenatti).

2.6.1 Exceptions

Exceptions to the freedom of establishment are stated in the articles 45 and 46, and same exceptions are applicable to the freedom to provide services via article 55. Article 45 attends to activities exercised by official authority, and has not been applicable to any gambling case. Article 46 states that *“(T)he provisions of this Chapter³⁴ and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health”*.

All restrictive measures, discriminating or not, have to be justified by the Treaty's derogations. In addition they must be necessary and proportional to the pursued objective. These requirements are called “rule of reason” from which the principle of overriding reasons of general interest derive. ECJ has concluded that derogations aiming at protecting the recipient of a service such as consumer protection and

³¹ Steiner, J and Woods, L. (2003) p. 338.

³² C- 55/94, *Gebhard*.

³³ Ibid, p. 339.

³⁴ This chapter is referring to the chapter (II) of establishment but the same provisions are applicable to the chapter (III) of services according to article 55.

public order can justify restrictions on the freedom to provide services.³⁵ In the *Gouda* case³⁶, the Court elaborated the rule of reason concerning services by stating that obstacles to the freedom to provide services, arising from national measures which are applicable without distinction, are permissible only if those measures are justified by overriding reasons relating to the public interest, if they guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it.³⁷

By virtue of article 46, the Treaty provides three exceptions: (1) public policy, (2) public security and (3) public health. They shall, according to case law³⁸, be viewed holistically, and therefore it is questionable if only one fulfilled requirement is enough. Following arguments does not just fall within one exception, but often within all three, and they are constantly being adduced as exceptions with a changing outcome over the years since the circumstances have varied: Responsible gambling policies as it aim at limiting the exploitation of the human passion for gambling. Organised crime as money laundering, tax evasion and frauds levelled at consumers are some of the undesired consequences. The allocation of the profits to public benefit, which constitutes economical motives, was in *Schindler*, considered as pertaining to the public interests in addition to the others.³⁹ But in *Zenatti*, the ECJ expressed it should merely comprise an incidental beneficial consequence and not the real justification for the restrictive policy adopted.⁴⁰

2.6.2 Principle of Overriding Reasons of General Interest

As articles 28 and 30 only apply to “goods” and not to “services”, the doctrine of *Cassis de Dijon*, is neither applicable to services nor establishments, see section 2.5 Free Movement of Services. However, services and establishments have gotten their correspondence to the *Cassis de Dijon* through the *Gebhard*⁴¹ case.⁴² The Court put forward four requirements that must be fulfilled by a national measure restricting the freedoms guaranteed by the Treaty. The *Gebhard* test⁴³, as it is called, states that the restriction must:

1. be applicable in a non-discriminatory manner
2. be justified by reasons of public interest

³⁵ See the joined cases 110/78 and 111/78 *Van Wesemael*, paragraph 28; 220/83 *Commission/France*, paragraph 20; and 15/78, *Koestler*, paragraph 5. Reference was made in *Läärä* paragraph 33 and *Zenatti* paragraph 29.

³⁶ C-288/89, *Gouda*.

³⁷ *Ibid*, paragraphs 13-15.

³⁸ C-275/92, *Schindler*, paragraph 58. However, Advocate General Gulmann could not preclude that these arguments when considered separately, would not justify the restriction imposed. Opinion of Advocate General Gulmann, paragraph 92.

³⁹ C-275/92, *Schindler*, paragraph 60.

⁴⁰ C-67/98, *Zenatti*, paragraph 36.

⁴¹ C-55/94, *Gebhard*, see also C-369/96, *Arblade*, in *Läärä* paragraph 31 it is referred to C-288/89, *Gouda*

⁴² Bernitz, U. (2005) p. 208.

⁴³ C-55/94, *Gebhard*, paragraphs 37, 39 and 46 by referring to C-19/92, *Krauss*, paragraph 32.

3. be suitable for the pursuance of the aimed objective
4. not go beyond what is necessary to achieve this objective

These four questions comprise the three last steps in the analysis. The first question in the Gebhard test constitutes the third step in the analysis, see section 4.1.3 If there is a Restriction in Place, is it Discriminating?, the second question constitutes the fourth step in the analysis, see section 4.1.4 Is the Restriction Justified?, the third and fourth questions constitutes a proportionality test and the fifth step in the analysis, see section 4.1.5 Is the Restriction Necessary and Proportionate?

2.7 Proposal of Service Directive

The European Council initiated an economic process of reform in Lisbon⁴⁴ striving for EU to be the most competitive intellectual economy within 2010. The area of services was targeted as the most important in this progress, but there are still many obstacles within the EU.

In December 2000, the European Commission published a report with the objective to remove all remaining service barriers⁴⁵. The ultimate aim is to attend the movement of services within a country in the same manner as movements between countries within the EU. To facilitate that aim, a two-step approach was set out. A first report⁴⁶ was to identify existing barriers, and a second report⁴⁷ was to bring forward a package of initiatives dismantling the barriers.

A proposal for a Service Directive⁴⁸, which is to take effect within 2010, endeavours the principle of origin⁴⁹ in article 16 (also known as an internal market clause), but according to article 18 gambling activities are excluded from this principle, at least temporarily. By virtue of article 40, the Commission shall have one year to inquire the possibility to present a proposal for harmonisation regarding gambling activities. The temporary exclusion regarding gambling activities has its explanation in the widely differences between the nations' outlooks on how gambling activities should be tackled – to restrict it or tax it. In the preamble of the proposal it is clearly stated that this Directive does not imply an abolition of existing gambling monopolies.⁵⁰

In January, 2006, the European Parliament is expected to vote regarding the proposal for Directive on services, and especially the internal market principle, A

⁴⁴ Lisbon, European Council, Presidency conclusions (2000).

⁴⁵ Ibid. This proposal had gambling included in the principle of country of origin whereby it was rejected by Germany (Gerhard Schröder) and France (Jacques Chirac).

⁴⁶ COM(2002)441 final.

⁴⁷ COM(2004)2 final.

⁴⁸ Ibid.

⁴⁹ The principle states that once a service provider is operating legally in one Member State, it can market its service in another Member State without having to submit to further rules than of its original Member State. For example, a UK-based gambling provider would not have to acquire a Swedish gambling license according to this principle. However, this is not the case since gambling is excluded from the directive until further notice.

⁵⁰ COM(2004)2, preamble paragraph 35.

majority of the Member States seem to support to exclude gambling, taxes and health case.⁵¹

Moreover, a comparative study on “Gambling Services in the Internal Market” is being conducted by the Commission.⁵² Subject of investigation is the effectiveness of the national restrictions in meeting the invoked public interest objectives (public order, consumer protection, media pluralism, and the protection of cultural policy objectives), taking into account the requirements set out in the case law of the ECJ. The result will have an effect on how gambling ought to evolve within the EU – taxed, banished or something in between. Therefore, the study is of great importance, but it has been argued that its independence and impartiality is in danger.⁵³

2.8 Directive on E-Commerce

The Directive strives to ensure that Information Society services benefit from the internal market principles of free movement of services and freedom of establishment and to be provided throughout the Union if they comply with the law in their Member State.

Directive 1998/34/EC, amended by Directive 98/48/EC, state that an information service is a service if⁵⁴: (1) normally provided for remuneration at a distance, (2) conducted by electronic means and (3) executed at the individual request of recipient of services. By this, e-gamble can be considered as a service of the information society. Further, the Directive on electronic commerce⁵⁵ imposes, as well as the Directive on services, the internal market clause expressing the principle of country of origin in article 3. However, by virtue of article 1, the directive is not applicable to gambling activities.

An adoption of a European regulatory framework for e-gaming services seems to be appropriate, in view of the de facto borderless nature of e-gaming services and the need to regulate the information society from a higher level than that of the Member States. An EC framework would, partly establish the ground principles for the cross-border provision of e-gaming services and harmonize consumer protection in the field of gaming legislation, partly give Member States a certain degree of flexibility

⁵¹ Dagens Industri, (2005-11-29).

⁵² The Commission appointed the Swiss Institute of Comparative law, which has formed a consortium with the Centre for the Study of Gambling of the University of Salford to carry out the economic part of the study.

⁵³ According to the European State Lotteries and Toto Association there are doubts concerning the independence and impartiality of the Centre for the Study of Gambling of the University of Salford to whom the economic part is outsourced. Salford are sponsored by a number of British operators in the gambling sector, in particular an important British ‘bookmaker’ involved in most of the cases tried before the Italian courts and referred to the European Court of Justice, which is endeavouring to radically modify the legal framework regulating this sphere of activity. And it is alarming since the Centre for the Study of Gambling of the University of Salford states on its website that its Sponsors’ Advisory Board ‘meets to ensure that the legitimate interests of sponsors are adequately secured’ (*Written question E-2206/05*).

⁵⁴ Directive 98/34/EC, article 1.2.

⁵⁵ Directive 2000/31/EC.

to adopt tailored national measures, in compliance with the European framework. Therefore, such a framework could be advocated to be in the best interest of all parties concerned.

2.9 European Case Law on Gambling

The conflict between the essence of the EC, in its free movement, and the obstacles for these freedoms across borders that follows from a monopoly is constantly being brought before national Courts and the ECJ. In those cases, the public interests are being questioned and at trial in order for the European monopolies to sustain. There is no explicit regulation within the EC as far as gambling is concerned, but on one hand the basic freedoms and competition distortion can and are being adduced, mainly by the Commission, and on the other hand, the Member States are adducing the public interest and its overriding reasons, in favour of the monopolies. The Commission recognizes that national restrictions can be justified by public interest objectives, but according to the jurisprudence of the ECJ, these restrictions must not go beyond what is necessary to attain these aims of public interest.

However, in one precedential case⁵⁶, the ECJ withheld that in absence of any EC legislation, the Member States has the power to individually assess, based upon their social model, what kind of measures should be imposed to maintain order in society. For example, if one Member State prohibits certain gambling activities while another practises a less restrictive regime, neither does it necessarily imply that the more restrictive measure is disproportionate in relation to the objective pursued nor unnecessary.

Later jurisprudence has stressed that a restriction could only be allowed if legal disposition imposing such a restriction de facto corresponded to the evoked objectives.⁵⁷ Therefore, it could be argued that a restriction must have a legal disposition concerning that objective inserted in the legal instrument, in order for a Member State to evoke for example the protection of consumers.

2.9.1 Schindler⁵⁸

The Schindler verdict from 1992 was the first preliminary ruling concerning gambling. The main question of the case was if the freedom to provide services constituted an obstacle for a national legislation prohibiting lotteries.

The background to the case was a mailed invitation to British citizens from the Schindler brothers to take part in a German lottery. G. and J. Schindler were agents for SKL⁵⁹ and, therefore, responsible for sending advertisement, ordering forms and, if necessary, lottery tickets, on behalf of SKL. The invitations were stopped in the British customs since lotteries of this kind were prohibited according to British law.

⁵⁶ C- 275/92, *Schindler*, paragraph 61; Schindler, opinion of A.G. Gulmann, paragraphs 101-102.

⁵⁷ C- 67/98, *Zenatti*, paragraph 46.

⁵⁸ C- 275/92, *Schindler*.

⁵⁹ Süddeutsche Klassenlotterie.

Main questions were whether lotteries were considered to fall within the scope of the free movement of services according to article 49 Treaty, and if that service could be restricted when it comes to games and lotteries.

By way of introduction, ECJ regarded the activity in question to be considered as an economic activity⁶⁰, see section 4.1.1 Does the Regulation Concerned Relate to an Economic Activity? If the activity would not have been considered as an economic, the Treaty would not be applicable.

The objects at issue were also to be related to “services”, and not “goods”, even though they were physical products⁶¹, see section 4.1.2 Does the Economic Activity Relate to the Free Provision of Services or Goods?, for further reasoning. According to the ECJ, the activities in question were merely the first step towards the organisation and conduction of a lottery and therefore they could not be considered as independent from the lottery. The British legislation was also considered to constitute an obstacle to the freedom to provide services⁶², even though the national measure was applicable without distinction.⁶³

What was stated next has in the aftermath become a lodestar for the protectionist argumentation of the Member States. ECJ found the restriction on the cross-border provision of lottery services compatible with the Treaty by considering:⁶⁴

- a) the particular nature of lotteries including moral, religious and cultural aspects,
- b) the general trend within the Member States to regulate and even forbid gambling with the purpose to control private profits,
- c) the fact that lotteries in many cases increase the risk of different kinds of criminality, inter alia fraud,
- d) that lotteries give incentive to spend money with possible negative individual and social consequences and
- e) although not considered to be an objective justification as such, lotteries are an important contributor for the financing of good causes and public interest activities.

ECJ concluded the above-mentioned circumstances to justify the discretionary power of national authorities to determine the extent of the protection afforded by a Member State on its territory with regard to lotteries and other forms of gambling. Thus, when a Member State forbids advertisement on their territory, for big lotteries organised in another Member State, it does not constitute an illegitimate restriction on the freedom to provide services. On the contrary, such a restriction is necessary in order to maintain the protection set forth by the Member State on the subject of lotteries.

⁶⁰ C-275/92, *Schindler*, paragraph 19.

⁶¹ *Ibid*, paragraph 25.

⁶² *Ibid*, paragraph 45.

⁶³ *Ibid*, paragraphs 43 and 47.

⁶⁴ *Ibid*, paragraph 60

Advocate General, A.G. Gulmann, shared the same view in his preliminary ruling by reasoning that, in view of the unknown implications of an open and competitive gaming sector, it was not possible to identify less restrictive measures for achieving the pursued objectives.⁶⁵

2.9.2 Läära⁶⁶

In Läära, the case in point was whether national legislation reserving to a public body the right to run the operation of slot machines, on the territory of the Member State concerned, was compatible with the provisions in the Treaty, especially the freedom to provide services.

Läära, a private person, had been offering gambling on slot machines, on behalf of a British company without a licence. According to Finnish law, only one subject could be granted a licence for operating games on slot machines and at the time period in question, it had been granted to RAY⁶⁷. Läära argued for his cause that the prospects of winning offered by the slot machines was not based exclusively on chance but also, to a large extent, on the skill of the player. Therefore, those machines could not be regarded as gambling machines, and the Finnish legislation was contrary to the EC rules governing the free movement of goods and services.

The Court considered the slot machines as goods that could fall within article 30⁶⁸, but not in this case, for elaboration see section 4.1.2 Does the Economic Activity Relate to the Free Provision of Services or Goods? It was, however, stated that such legislation constituted an obstacle to the freedom to provide services.⁶⁹

The Finnish Court wanted to know if an analogy could be made with the *Schindler* ruling. Läära, unhappy with the verdict in *Schindler*, argued that the cases differed – *Schindler* was about an international lottery with high prizes, while this regarded an entertainment game with small prizes.⁷⁰ But according to *Schindler*, the organization of lotteries was to be equally applicable to other comparable forms of gambling^{71,72}

ECJ ruled that Finnish law was consistent with EC-law, considering *Schindler*, since the provision aimed at the pursued objective. The aimed objective was to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud

⁶⁵ C- 275/92, *Schindler*, Opinion of Advocate General Gulmann paragraph 126.

⁶⁶ C- 124/97, *Läära*.

⁶⁷ Raha- automaattiyhdistys (Association for the Management of Slot Machines)

⁶⁸ C- 124/97, *Läära*, paragraph 20.

⁶⁹ C- 124/97, *Läära*, paragraph 29.

⁷⁰ C- 124/97, *Läära*, paragraph 11.

⁷¹ C- 275/92, *Schindler*, paragraph 49.

⁷² ECJ had in the past declined to equate certain games with lotteries of the type considered in *Schindler*, see C-368/95, *Familiapress*. The case concerned competitions published in magazines in the form of crosswords or puzzles, giving readers who had sent in the correct solutions the chance of being entered in a draw from which a number of them were selected as prize-winners. As the Court noted, particularly in paragraph 23 of that judgment, such games, organised only on a small scale and for insignificant stakes, do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine.

to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes. The Court concluded that there were no disproportional regulations with respect to the aimed objective, or discriminatory for that matter. According to *Schindler*, national authorities had a discretionary power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling.

The Court considered the Finnish provision fulfilling all the requirements necessary in order to obtain an exception from the EC freedoms. It was also pointed out that "...given the risk of crime and fraud...", there were no alternatives (such as taxation) to a non-profit making approach that were equally effective to ensure "...that strict limits are set to the lucrative nature of such activities".⁷³ In addition, "...the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State, cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide."⁷⁴

Contrary to the quoted opinions and decisions, it was Advocate General La Pergola's opinion that the Finish law, granting RAY the right to run gambling machines, did not meet the criterion of proportionality. However, the ECJ saw it differently and did not follow this opinion.⁷⁵

2.9.3 Zenatti⁷⁶

In 1998, the main question was whether a national provision restricting the taking of bets could constitute an obstacle to the freedom to provide services according to the Treaty.

Zenatti ran a centre for the exchange of information on sport bets and acted as an intermediary in Italy for a British company (SSP⁷⁷) specialising in taking bets. In Italy, betting where only permitted on events organized by the national Olympic Committee, CONI⁷⁸ (sports events) and the national equine organization, UNIRE⁷⁹ (horse races). Other subjects could submit invitations to tender for licenses to organize bets, in return for, payment of the relevant levies, and being subject to comply with ministerial guidelines regarding the proper management of betting activity.

⁷³ *Läämä*, C- 124/97, paragraph 41.

⁷⁴ *Ibid*, paragraph 36.

⁷⁵ *Läämä*, C- 124/97, Opinion of Advocate General paragraph 40.

⁷⁶ C- 67/98, *Zenatti*.

⁷⁷ SSP Betting Ltd.

⁷⁸ Comitato Olimpico Nazionale Italiano.

⁷⁹ Unione Nazionale Incremento Razze Equine.

Zenatti argued that *Schindler* was not applicable since this case dealt with competence and skilfulness in predicting the outcomes. By referring to skilfulness, betting could be interpreted as a contest rather than gambling. According to Zenatti, the justifications in terms of social considerations and prevention of fraud should not be considered as enough to restrict the free movement of services. The Italian Court on the other hand advocated for an analogy with *Schindler* before referring to the ECJ.

ECJ did observe two discrepancies between the cases. Firstly, in *Schindler*, Great Britain had a total ban against large-scaled lotteries, while in this case, there was no total ban. Instead, the government let certain selected organizations to run gambling with special regulations. The Court stressed that the mere fact that one Member State prohibits certain gaming activities, while another Member State advocates a less restrictive regime, for example, by granting a limited number of licenses, does not necessarily imply that the more restrictive measure is disproportionate in relation to the objective pursued, or unnecessary.⁸⁰ Secondly, in the case set forth, the freedom of establishment could apply since SSP possessed the right to run gambling business in another Member State and aimed at the same freedom in Italy. Notably, the Italian Court did not raise both questions before the ECJ. Hence, the ECJ only considered the question regarding the movement of services, since it was prevented from examining the case on the basis of establishment.⁸¹

The ECJ concluded that, according to previous case law, the freedom to provide services may be restricted by Italian law, if it could be motivated by social considerations and aimed to prevent the harmful effect that could be caused by gambling.

Advocate General Fennelly was of the opinion that it was for the national Court to consider whether the two conditions, necessary and proportionate, were met. Further, Fennelly condemned a Member State to engage either directly or through certain privileged bodies in the active promotion of officially organized gambling with the primary objective of financing social activities, however worthy, under the guise of a morally justified policy to control gambling.⁸²

2.9.4 Anomar⁸³

The question concerned Portuguese legislation relating to the operation and playing of games of chance or gambling under decree-law and whether it complied with EC-law. The questions were raised by Anomar⁸⁴ (the Portuguese national association of operators in the gambling machine sector) against the Portuguese state.

The Portuguese decree provided that the right to operate games of chance or gambling was reserved to the state. Although the state alone is entitled to that right,

⁸⁰ C- 67/98, *Zenatti*, paragraphs 34- 35.

⁸¹ Ibid, paragraph 20- 23.

⁸² C- 67/98, *Zenatti*, Opinion of Advocate General Fennelly, paragraph 32.

⁸³ C- 6/01, *Anomar*.

⁸⁴ Associação Nacional de Operadores de Máquinas Recreativas

it could be exercised, other than by the state or another public body, subject to authorization in the form of an administrative licensing agreement.

The decree-law was acknowledged by the Court to be applicable without distinction to its own nationals and nationals of other Member States, and constitute a barrier to the freedom to provide services. Nonetheless, such a law was considered justified in view of the concerns of social policy and the prevention of fraud.⁸⁵

By referring to *Läämä*⁸⁶ and *Zenatti*⁸⁷, ECJ stressed that that the possible existence, in other Member States, of legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation has no bearing on the compatibility with EC-law.⁸⁸ Therefore, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, falls within the margin of discretion which the national authorities enjoy.⁸⁹

2.9.5 Gambelli⁹⁰

In the Gambelli case the question raised was if a national legislation, which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorization from the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in articles 43 and 49 of the Treaty respectively.

Gambelli was an Italian agency, one among many, that belonged to the English bookmaker Stanley⁹¹. The agencies were accused of having collaborated in Italy with a bookmaker abroad in the activity of collecting bets which is normally reserved by law to the state, thus infringing Italian law. Such activity was considered to be incompatible with the monopoly on sporting bets, and was solely enjoyed by CONI⁹².

The case before the Italian Court^{93, 94} did not quite correspond to the facts already considered by the ECJ in *Zenatti*. Recent amendments to an Italian provision demanded a re-examination of the issue by the ECJ. It became known that the

⁸⁵ C- 6/ 01, *Anomar*, paragraph 75.

⁸⁶ C- 124/ 97, *Läämä*, paragraph 36.

⁸⁷ C- 67/ 98, *Zenatti*, paragraph 34.

⁸⁸ C- 6/ 01, *Anomar*, paragraph 80- 81.

⁸⁹ Ibid, paragraph 88.

⁹⁰ C- 243/ 01, *Gambelli*.

⁹¹ Stanley International Betting Ltd.

⁹² Comitato Olimpico Nazionale Italiano (The national Olympic Committee).

⁹³ Tribunale di Ascoli Piceno, the Italian court which was referring the case to the ECJ.

⁹⁴ The lower Court of Santa Maria Capua Vetere (Italy) refused to condemn Gambelli for infringing the Act concerning betting and gambling activities on sports competitions. Firstly, because the concerned activity was governed by UK law. Therefore the Italian legal prohibition was not applicable. Secondly, and going against the jurisprudence of the European Court of Justice, the Court held that the restriction of a UK authorized activity was against the principles of the internal market. In the appeal procedure, the Court of Ascoli Piceno (Italy), asked a preliminary ruling on the compatibility between the Italian Act and article 49 of the Treaty.

restrictions were dictated chiefly by the need to protect sports Totoricevitori, a category of private sector undertakings. Not only that, no public policy concerns were found by the Court in those restrictions able to justify a limitation of the rights guaranteed by the EC or constitutional rules.⁹⁵

Further, the national Court questioned whether the principle of proportionality was being observed, having regard, first to the severity of the prohibition imposed with criminal penalties which may have made it impossible in practice for lawfully constituted undertakings or EC operators to carry on economic activities in the betting and gaming sector in Italy, and secondly to the importance of the national public interest protected and for which the EC freedoms were sacrificed.

Foremost, the Italian Court also considered that it could not ignore the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign EC undertakings on one hand, and the considerable expansion of betting and gaming which the Italian state was pursuing at national level for the purpose of collecting taxation revenues, on the other.

In *Gambelli*, both the freedom to provide services and the freedom of establishment⁹⁶ were addressed. ECJ came with a ground breaking verdict, at least according to many anti-monopolists. It stated that the Italian Act was an obstacle to the freedom of establishment⁹⁷ and to the freedom to provide services.⁹⁸ *Gambelli* argued that it was remarkably that bettors in Italy were not only deprived of the possibility of using bookmakers established in another Member State, even through the intermediary of operators established in Italy, but by doing so they were also subject to criminal penalties. The Court agreed that the prohibition in question, enforced by criminal penalties, was a restriction on the freedom to provide services.

The sensational statement was the Court's notion that authorities of a Member State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures if they incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse.⁹⁹ Under present case, the state owned gambling company had been marketing their games aggressively in addition to a planned increase in amount of games. By these means, the purpose of the policies pursued could not have been to limit gambling, and therefore they did not have any right to limit the free movement of services.

Regarding the exceptions¹⁰⁰, the Court referred to paragraph 36 of the judgment in *Zenatti*, concluding that restrictions must in any event reflect a concern to bring

⁹⁵ C- 243/ 01, *Gambelli*, paragraph 19.

⁹⁶ This was not addressed in *Zenatti* since the national Court had not raised the question.

⁹⁷ C- 243/ 01, *Gambelli*, paragraphs 48- 49 and 59.

⁹⁸ *Ibid*, paragraphs 54 and 59.

⁹⁹ *Ibid*, paragraph 69.

¹⁰⁰ Measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.

about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorized games must only constitute an incidental beneficial consequence and not the real justification for the restrictive policy adopted. However, the Court concluded that it is for the national Court to determine:

1. Whether the restriction on the freedom of establishment and on the freedom to provide services could be *justified* by imperative requirements in the general interest, be *suitable* for achieving the objective which they pursue and *not go beyond what is necessary* in order to attain it. In any event, they must be *applied without discrimination*.¹⁰¹
2. Whether it in practice were more easily for Italian operators than for foreign operators to, regarding the manner in which the conditions were laid down, submit invitations to tender for licences to organise bets on sporting events. If so, those conditions do not satisfy the requirement of *non-discrimination*.¹⁰²
3. Whether the imposed restrictions were restrictions beyond what is necessary. Especially as in this case “...where the supplier of the service was subject in his Member State of establishment to a regulation entailing controls and penalties¹⁰³, where the intermediaries were lawfully constituted” and where “...before the statutory amendments effected by the Italian Act in question, those intermediaries considered that they were permitted to transmit bets on foreign sporting events”.¹⁰⁴
4. Finally, whether the aims which might justify the national legislation are actually served, and in the light of those aims, whether the restrictions it imposed were disproportionate.¹⁰⁵

As I will analyse in chapter IV, the delegations made by the ECJ to the national Court, has been advocated by either side. The fact that each question was given guidelines to the national Court to consider, is undisputed. The difference of opinion is composed of how strict the guidelines could be interpreted and therefore how much discretionary scope the ECJ actually had left to the national Court.

2.9.6 Opinion of Advocate General Siegbert Alber

I would like to give some consideration to Advocate General Siegbert Alber's opinion, since he kind of paved the way for the criticism in *Gambelli*. One should remember that the ECJ has more political considerations to embrace than the

¹⁰¹ C-243/01, *Gambelli*, paragraph 65.

¹⁰² Ibid, paragraph 71.

¹⁰³ Stanley was authorized to carry on its activity in the United Kingdom and abroad which made it subject to rigorous controls in relation to the legality of its activities, which were carried out by a private audit company and by the Inland Revenue and Customs and Excise.

¹⁰⁴ C-243/01, *Gambelli*, paragraph 73.

¹⁰⁵ Ibid, paragraph 75.

Advocate General, sharing a mere opinion, and often so in the spirit of *de lege ferenda*.

Alber did go further in his analysis of the case by not delegating the questions to the national Court to determine. The questions did not lie within the discretionary power of the Member State to determine, according to Alber.

Given the circumstances in the case, Alber did not consider Italy to practise a consistent policy in order to limit the supply of gambling, partly due to aggressive marketing, which was aimed to incite and encourage, partly due to the fact that legislation had opened up the possibility to offer an increased amount of supply of gambling. The claimed objectives, once stated, but no longer pursued, could no longer justify obstacles to the freedoms set forth in the Treaty.¹⁰⁶

Alber also stressed that it had become evident from the Member States' statements that they were afraid of the economic consequences a change in the gambling market could bring about.¹⁰⁷

In conclusion, when as in this case, the objective required for a justification can be questioned due to inconsistent politics and no overriding reasons of general interest is at hand, it can only be disproportional with a pain of criminal penalties.

2.9.7 Lindman¹⁰⁸

In Lindman, the question brought before ECJ was where a gambling winning should be taxed. The ECJ had to determine whether a national legislation, imposing tax on lotteries won abroad, was compatible with the freedoms within the Treaty; both to provide and receive services.

The Finnish woman Lindman had during a stay in Sweden bought a lottery ticket on which she later won SEK one million. The Finnish government wanted Lindman to pay income tax on the winning, even if all prizes in Finnish lotteries were exempted from tax for the buyer of the ticket since the organiser of the lottery was submitted to pay a lottery tax. The same rules apply in Sweden.

Lindman argued that the Finnish legislation was discriminating since she would not have been imposed to any income tax if she had lived in Sweden or if she had won in a Finnish lottery.

The Finnish Government admitted that the national legislation could be discriminatory, but that it should be justified by reasons of public interest such as the prevention of wrongdoing and fraud, the reduction of social damage caused by gambling, the financing of activities in the public interest and ensuring legal certainty.

According to case law¹⁰⁹, the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of appropriateness and

¹⁰⁶ C-243/01, *Gambelli*, Opinion of Advocate General Alber, paragraphs 23, 121 and 122.

¹⁰⁷ C-243/01, *Gambelli*, Opinion of Advocate General Alber, paragraph 127.

¹⁰⁸ C-42/02, *Lindman*.

proportionality of the restrictive measure adopted by that state.¹¹⁰ Further, the ECJ stated that it lacked evidence from the referring Court, in order to conclude a particular causal relationship between the gravity of the risks connected to playing games of chance and the participation by nationals of the Member State concerned in lotteries organized in other Member States.¹¹¹

For that reason, ECJ concluded that article 49 of the Treaty prohibits winnings from games of chance, organised in other Member States, being imposed income tax, as winnings from games of chance conducted in the Member State in question are not taxable.

Thus, in line with the European integration, even the area of taxation is becoming harmonized, and countries members of the EU and EFTA are now forced to change their tax legislation in accordance with the ruling.

2.10 Aftermath of Gambelli

Gambelli has been interpreted both in favour of, and against, a gambling monopoly, and will later be elaborated in chapter IV. This section aims to outline partly, the different verdicts of the national Courts post the *Gambelli* case partly, show actions taken against countries submitted to the provisions in question. The fact that it has been interpreted differently by the Courts, indicates the uncertainty from *Gambelli*, and that is the only thing for sure that *Gambelli* has rendered. Following has happened since *Gambelli*, in chronological order:

November 2003, German Court rules in favour of Westdeutsche Lotterie GmbH u. Co. oHG and Ladbrokes was forced to close down its German language Internet sites.¹¹²

However, in February 2004, the Hessischer Verwaltungsgerichtshof (Administrative Court of Appeal of Hessen) states that Article 284 of the German Criminal Code is not applicable to the offering of bets to German consumers, by foreign bookmakers, whether from within Germany or online. Penalising foreign bookmakers would constitute a blatant breach of Article 49 in the light of the extensive marketing made by Oddset to raise funds for the 2006 World Cup.¹¹³

February 2004, subsequently, the Administrative Court of Kassel declared the current state of licensing provisions on gambling as unconstitutional. Article 12 of the German Constitution concerns the freedom to choose one's profession and the state's exclusive right to operate sports betting was considered incompatible with it.¹¹⁴

¹⁰⁹ C- 55/ 94, *Gebhard* and C- 100/ 01, *Oteiza Olazabal*.

¹¹⁰ C- 42/ 02, *Lindman*, paragraph 25.

¹¹¹ Ibid, paragraph 26.

¹¹² Keuleers, E, (2005).

¹¹³ Ibid.

¹¹⁴ Hessischer Verwaltungsgerichtshofs in Kassel, verdict 9 February, 2004.

March 2004, the Commission sends a warning (letter of formal notice) to Denmark imposing it to justify its restrictions on non-Danish bookmakers, or else it will be brought before the ECJ.¹¹⁵

April 2004, German Constitutional Court, Bundesgerichtshof (BGH), declares it would be unjustified to impose an Austrian licensed bookmaker an obligation to obtain an additional German license. It referred to a decision of the Landgericht München I of 27 October 2003, in which the Court concluded the gambling monopoly of organization of sports bets and lotteries to be adopted and maintained by tax reasons and not of public order. A German Gambelli case is to be expected before the ECJ.¹¹⁶

May 2004, the Finnish government rejects licence applications from European Sports Betting Consultants and Ladbrokes on the grounds that licences granted to Oy Veikkaus AB and Fintoto Oy are still in force.¹¹⁷

May 2004, the most important Italian judiciary body competent in interpreting ordinary laws (the United Sections of the Italian Court of Cassation) confirms the legality of the Italian state's monopoly.¹¹⁸ The opinion of the Court is that the purpose is to "canalize" the demand into more checkable systems in order to combat criminality.¹¹⁹

June 2004, an interlocutory judgement is given by the Court of Arnhem, in which explicit reference was made to Gambelli and in which it was held that restrictions imposed to prevent Ladbrokes entering the Dutch market were inconsistent with European Law. The outcome was in respect of the marketing budget (€ 25 millions) of De Lotto organization and Holland Casino, and the very deliberate attempts to stimulate demand for new gambling products. It can be argued in consistency with *Gambelli*, as no public order in order to justify restrictive measures could be adduced, where participation in lotteries, games of chance and betting were encouraged by the Member State with the aim to accrue the public purse.¹²⁰

In July 2004, the Italian Supreme Court rules in favour of Italy's restrictive gambling politic. As the restrictions were justified by public order interest (keeping gambling free from criminality), it did not constitute a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 of the Treaty respectively. Notably, the Larino District Court subsequently referred the case (*Placanica*¹²¹) to the ECJ. Its judgment is still pending.

October 2004, the Commission refers Greece to the ECJ for infringing Union regulations on the free movement of goods and services, since Greek Law Number

¹¹⁵ IP/ 04/ 401.

¹¹⁶ Keuleers, E., (2005).

¹¹⁷ Ibid.

¹¹⁸ Ruling no. 23272 of May 18, 2004.

¹¹⁹ Del Nino, A., (2004).

¹²⁰ Keuleers, E., (2005).

¹²¹ Case C- 338/ 04, *Placanica*.

3037 explicitly forbids electronic games with "electronic mechanisms and software" from public and private places, with offenders facing fines of 5,000 to 75,000 euros and imprisonment of one to twelve months.¹²²

Later in October, the Swedish Supreme Administrative Court delivers a ruling in favour of the state's gambling monopoly. This is followed by Douglas Roos (CEO of Ladbrokes) accusing the Court of "running political errands".¹²³

November 2004, legal proceedings are initiated against online bookmaker Sportingbet, by Hungary's Gambling Supervision, on grounds of contravening the gambling legislation. A fine has already been imposed Provimar Kft, Sportingbet's Hungarian media buyer Ft 500,000 and asked the company to remove Hungarian-language content from the Sportingbet website.¹²⁴

Same month, a Court of appeal upheld the decision of Oslo's Municipal Court that the planned state monopoly on gambling machines violates the European Economic Area (EEA) Agreement regulations¹²⁵. Prior to this, a letter of formal notice was sent by the EFTA Surveillance Authority in April same year, in which a monopoly was not considered to be the answer in the prevention of gambling addiction or under-age gambling, to control software, to introduce new regulations more quickly, or to combat crime. In the end it stated that same effects could be achieved by the imposition of stricter rules on private operators.¹²⁶

February 2005, the Dutch Supreme Court upholds a ruling implying that Ladbrokes, as it does not have a Dutch betting licence cannot accept bets from customers based in Holland.¹²⁷

May 2005, a recent government decision preventing Ladbrokes from operating in Finland is overturned by the Finnish Supreme Administrative Court.¹²⁸

June 2005, as oppose to previous ruling, the Swedish Supreme Administrative Court decides not to overturn the Swedish government's decision¹²⁹ to reject an application from Ladbrokes to be allowed to set up betting operations in Sweden.¹³⁰

July 2005, le tribunal de grande instance de Paris ruled that Zeturf Ltd should stop accepting bets on French horse racing.¹³¹

August 2005, the Norwegian Court of Appeal overturns an earlier ruling by the Oslo Town Court, concluding that the granting of a monopoly on gambling machines to Norsk Tipping does not violate European Economic Area (EEA) rules on free

¹²² IP/04/1227.

¹²³ Dagens Industri (2005-06-20).

¹²⁴ Keuleers, E., (2005).

¹²⁵ As EFTA members Norway should be imposed the same rules.

¹²⁶ PR(04)10, see also PR (04)35.

¹²⁷ Keuleers, E., (2005).

¹²⁸ Press release, Ladbrokes (2005).

¹²⁹ FI2003/6390.

¹³⁰ Swedish Supreme Administrative Court, 3841-04.

¹³¹ Keuleers, E., (2005).

movement of services and freedom of establishment. The Court found the granting of a monopoly proportionate to the policy aiming to decrease the supply of betting and cited *Läämä*.¹³²

August 2005, a Dutch Court rules in favour of online gambling restrictions and orders the UK based bookmaker Ladbrokes to stop offering online services to Dutch citizens. A €10 000 penalty per day for non compliance is imposed by the Court.¹³³

September 2005, an attended and anticipated decision is being delayed to early 2006.¹³⁴ The German Federal Constitutional Court is to regard the provision of betting services by private companies. According to Wulf Hambach, the Court has delayed its decision, in response to huge public pressure; he nonetheless concludes, that the fact that the Court has asked for an oral hearing, may strongly indicate a preference in favour of liberalising the German betting market.¹³⁵

November, 2005, the Swedish Supreme Court refers a case to the ECJ, regarding Unibet's interlocutory legal protection concerning the polemic of the freedom to provide services and Swedish provisions.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Case number: 1BvR 1054/01

¹³⁵ Hambach, W., (2005).

CHAPTER III

Swedish Framework

3.1 Background

In Sweden, the gambling and lottery markets are regulated whereby only certain actors are allowed, these actors being public benefit organizations, the horse racing industry and the Swedish state¹³⁶, see Appendix 1, chart 1.

Within gambling and lottery, from the Member States' point of view¹³⁷, there is an estimated high risk for unscrupulous arrangers to exploit a lottery, for example, for criminal purposes such as fraud or usury. Furthermore, lotteries and gambling involve risks of social and economic considerations for consumers. Hence, lotteries have for many years been subject to state regulation in Sweden, as well as in other parts of the world.

However, the Swedish state has a double function since it, partly conducts the commercial operation of gambling (through Svenska Spel and ATG), partly carries out supervision (through The Swedish gambling board - Lotteriinspektionen). Both operations are submitted to the Department of Finance. The double function of the state is often referred to as leading to a situation of conflict. On one hand, gambling must be suppressed by the legislator, but on the other hand gambling must be sold as a product.

3.2 The Swedish Monopoly

Last year (2004), the Swedish gambling market amounted to approximately SEK 36,5 billion, see Appendix A, table 1. The subjects allowed to conduct gambling and lottery activities in Sweden are Svenska Spel AB, AB Trav och Galopp (ATG) and

¹³⁶ Svenska Spel AB, AB Trav och Galopp (ATG), Spero (A- Lotterierna and IOGT- NTO- lotterierna).

¹³⁷ SOU 1992:130, p. 99 and prop. 1995/96:169, p. 11.

public benefit organizations. Svenska Spel is a company wholly owned by the Swedish state which arose through a fusion between Tipstjänst AB and Penninglotteriet AB, in January 1997. The fusion was made to strengthen the companies due to increased demand of gambling and increased competition.¹³⁸ The operations of Svenska Spel include bettings at sporting events and dog races, the operation of gambling machines and the organization of lotteries. ATG is owned by the horse racing industry and operates bettings at horse races. "Public benefit organizations" is a collective term that covers voluntary organizations that carry out work for the public benefit. The public benefit organizations organize lotteries and bingo. All Swedish operators were granted permission a, in 2002, to use new technologies, such as the Internet, for the distribution of lotteries.

3.3 National Legislation

Two Acts of parliament governs lotteries in Sweden: The Lottery Act and The Casino Act. The Lottery Act establishes general regulation of all lottery activities in Sweden. The Casino Act regulates casinos operating by international rules of gambling. The government has granted Svenska Spel a permit to arrange casino gambling, and the first opened in June 2001. To this date, December 2005, there are four casinos in the cities of Stockholm, Göteborg, Malmö and Sundsvall respectively. A third Act of interest is the Public Procurement Act. However, in its § 2, services supplied by undertakings entrusted exclusive rights, according to Swedish provisions and in accordance with EC-law, shall be excluded from the Act. Consequently, as in section 2.4 Competition Law, it all comes down to whether the Swedish provisions are incoherent with EC-law. For purpose of this paper, emphasis is therefore put on the Lottery Act.

3.3.1 Lottery Act

The Lottery Act is foremost to be applicable on lotteries organised for the public. By virtue of § 3, a lottery is defined as *"an activity where one or more participants may, with or without a stake, obtain prizes of a higher value than that which each and every one of the other participants may obtain"*.

Main principle in § 9 states that lotteries are only to be organised after an obtained permit, which according to § 10, only can be obtained if the operations can be assumed to be conducted in an appropriate manner from a general point of view and in accordance with directions, conditions and regulations issued.

As stated in § 15, the permit can further only be granted to Swedish legal entities that are non-profit associations that, according to its constitution, have the promotion of objects that are of public benefit within the country and that conducts activities that principally satisfy such objective.

According to § 27, only state owned gambling companies can obtain a permit to arrange gambling on token machines, that is, only Swedish undertakings.

¹³⁸ Prop. 1995/96:169, p. 12.

In § 38, there is a prohibition on promotion of participation in unlawful lotteries arranged within the country or in lotteries outside the country. Note that lotteries outside the country do not have to be unlawful, they are per definition excluded. This means that only Swedish lotteries are to be promoted in Sweden. The preparatory work advocates the prohibition on promotion of participation to be necessary, as the prohibition of organising lotteries without permission otherwise would be pointless, in order for the current state to sustain.¹³⁹ Moreover, as the prohibition in § 15 could be justified by overriding reasons, § 27 was viewed in the same manner, hence, no amendments was therefore suggested in the preparatory work.

In accordance to § 45, the government has granted requests from ATG, Svenska Spel and A-Lotterierna to organise gambling over the Internet. The paragraph offers the possibility to grant special lottery permits in other cases and according to other procedures than otherwise provided by the Lottery Act.

The supervisory body is Lotteriinspektionen (the Gambling Board), and its duties include the supervision of the Swedish gambling market, based on the protective aims specified in the Lottery Act. Permits for lotteries are granted at the level of a municipality, a region or across the whole country. Other permits are granted by municipalities, county councils, the Gambling Board, or by the government.

By virtue of § 45, it is a criminal offence to organise a lottery in Sweden without a permit, but participation is excluded from the criminal offence. It is also forbidden to promote participation in lotteries arranged outside the country. Violations may result in fines or imprisonment.

3.4 Swedish Gambling Monopoly under Scrutiny

The Commission has received several complaints regarding the Swedish legislation concerning slot machines and the monopoly in general, whereby a formal notice was submitted to the Swedish government. The notice expressed standpoints regarding the purpose of the Swedish legislation and its compatibility with EC-law.¹⁴⁰ The Commission considers the Swedish gambling monopoly to mainly have an economic purpose.¹⁴¹

The reply¹⁴², given in the end of 2004, advocated profit maximization as subordinated to public interest. Notably, the notice mainly refers to slot machines; inter alia the Jack Vegas- and Miss Vegas- machines and the public procurement of them. Thus, the entire gambling legislation was not at scrutiny.

Subsequently, all marketing regarding the Jack Vegas and Miss Vegas ended in 2001 since it constituted one of the most addictive forms of gambling according to

¹³⁹ SOU 2000:50, p. 155

¹⁴⁰ COM:s ref SG- Greffe(2004).

¹⁴¹ Ibid, p. 17.

¹⁴² Fi 2004/4965.

Folkhälsainstitutet¹⁴³. Svenska Spel has on the other hand, made large marketing investments regarding their other products. In 2003 over SEK 800 million were spent on advertising by the state owned gambling companies and even more has been spent since then.¹⁴⁴ The Swedish government has explained the aggressive marketing as necessary in order to compete with foreign gambling companies.¹⁴⁵ Since the nature of gambling has become border-less, the fact that there exists a gambling monopoly has been erased.

3.5 Swedish Case Law on Gambling

There are not many cases brought before the national Courts that touch the question of applicability of EC-law on national provisions. Most of the cases concern the advertisement of a gambling company. A few cases have been brought before the Courts of Appeal, and none have been referred to the ECJ until recently. However, three cases, presented below, were recently brought before the Swedish Supreme Administrative Court and they all faced the same outcome. Case 5819-01 is very elucidative whilst case 7919-01 only refers to the first one as it was first announced that day. The last case has been referred to the ECJ by the Swedish Supreme Court, thus, it is pending.

3.5.1 Case 5819-01

The case concerned an arrangement of gambling offered by SSP Overseas Betting Limited (SSP) in which Wermdö Krog AB was the intermediary. Wermdö had previously been submitted a fine by the Swedish Gambling board. The question was if § 38 of the Swedish Lottery Act, the prohibition of promoting participation in foreign lotteries, was compatible with the Treaty.

It was mainly a question of whether national provisions were discriminating foreign companies as they, from a general point of view, were excluded from the operation of gambling and lottery.

Adduced arguments by SSP and underlying causes were the following:

- The practical effect of the Swedish provisions does not correspond to the claimed underlying objectives. It is irrelevant if the objective is in line with EC-law, if it is not practised.
- Svenska Spel and ATG are investing an estimation of SEK 800 millions each year in marketing.¹⁴⁶ If the state really safeguards consumers against gambling

¹⁴³ Report from Folkhälsainstitutet (2003), p. 51.

¹⁴⁴ The information derives from Swedish Supreme Administrative Court, case number 5819-01, in which an appreciation was made. The marketing costs are explicitly specified in the annual report of Svenska Spel but according to Chief Information Officer, Andreas Jansson, the marketing costs of Svenska Spel amount to SEK 250 million (sponsoring are not included in this post). Director of Communications, Claes Tellman, adds that the costs were SEK 330 millions before discounts and that the confidential discounts are of large proportions.

¹⁴⁵ Fi 2004/4965, p. 6.

¹⁴⁶ Swedish Supreme Administrative Court, 5819-01.

addiction, then it should be addressed in the same way as alcohol and tobacco, and advertisement should be prohibited for all operators.

- As a result of the aforementioned, Sweden has more addictions among youths than other European countries. It enhances the image of the Swedish state of not giving priority to consumer interest but to benefit the public purse.
- ATG has obtained a permit to promote participation in lotteries organised abroad. The permission is conditioned with allied foreign organizations to receive equivalent permissions. Therefore, it appears as the Swedish government only permits foreign companies as long as foreign consumers could be assumed to cover the domestic loss derived from playing abroad.
- Overall, the Swedish state is representing a politic that contributes to an increased number of gambling products with the objective to benefit the public purse, whereby no overriding reasons can be applicable.

The Court followed the Swedish state's arguments and asserted that Gambelli did not affect the Swedish case law as adduced by SSP. Gambelli has to be viewed in the light of the Italian framework, partly as the legislative change was made to protect certain private operators as others were prohibited to continue, partly due to Italian policy conducted whereas a substantial increase was made in the number of games offered.

The most central question, acknowledged by the Court, was whether the objectives were real. Put more concrete, whether restrictive policy practised by the Member State is a question of public interest, and therefore embraced by overriding reasons, or a question of protecting a monopoly from foreign competitors in order to benefit the public purse. SSP has particularly adduced extensive marketing, continuous introduction of new products and the fact that gambling is increasing constantly. The Court did conclude that the marketing was extensive and intensive, and therefore, consumers were "*incited and encouraged to participate in lotteries, games of chance and betting*"¹⁴⁷. However, in order for the Swedish measures to be incompatible with EC-law, the actions must be "*to the financial benefit of the public purse*"¹⁴⁸. Albeit, it would be naive to think that the economical contribution plays a minor importance, however, it could not be taken for granted that it was the only or completely dominating objective.¹⁴⁹

Further the Court stated the criteria of proportionality to play a less prominent role in perspective of EC-law than adduced by SSP. When several alternatives are at hand, it lies within the discretionary assessment of the Member State to choose which alternative, as long as it is not disproportionate considering the aimed objective (*Läärä* paragraph 39 and *Gambelli* paragraph 75).¹⁵⁰ Considering the circumstances,

¹⁴⁷ C-243/01, *Gambelli*, paragraph 69.

¹⁴⁸ Ibid.

¹⁴⁹ Swedish Supreme Administrative Court, 5819-01, p. 500.

¹⁵⁰ Ibid, p. 499.

the legislator could not be invoked to, with regards to a proportionality test, choose a less restrictive model.

By referring to *Läärä* paragraph 37 and *Zenatti* paragraph 35, the Court emphasized that even though games in issue were not totally prohibited it could not serve as evidence of that the national legislation was not in reality intended to achieve the objectives of public interest. And by the vast amount of money involved, risk of attracting criminality and fraud was considered as evidently high.

As far as the prohibition in § 38 is concerned, the Court acknowledged the unfortunate wording. Thus, it clarified that according to preparatory work¹⁵¹, no discrimination was intended since the measure is applicable on both Swedish and foreign lotteries for which a permit had not been obtained.

As the ECJ delegated discretionary assessment to the national Courts which comprised an obligation to, from time to time, examine if practical application was in accordance with EC-law, the Court acknowledged the outcome to may vary over time. The Court therefore remarked the government adoption of a directive¹⁵² as this will result in a proposal for legislative adaptation to the development of EC-law, and in particular to recent case law.

3.5.2 Case 7119- 01

In this case the question was whether the prohibition of promoting participation in foreign lotteries could be applicable to the circumstances and if the provisions were applicable to EC-law.

A banner had been placed on a website by person A.B. whereby visitors were directed to SSP's website. A.B. had received reimbursement for this action which lead the Court to assent previous verdicts by lower Courts and the gambling board, by which the Swedish provisions were found to be in accordance with EC-law.

3.5.3 Case 3841- 04

Ladbrokes had been refused an application, by the Swedish government, to organize gambling. The question was whether the government had refused the application correctly, in accordance with EC-law.

Ladbrokes wanted to obtain a permit from the Swedish government to organize gambling, but was refused on grounds that surplus shall accrue to public interest. According to *Gambelli*, the raising of money for good causes cannot in itself justify a restrictive policy, whereby Ladbrokes questioned the reason for the rejection.

The Swedish Supreme Administrative Court did acknowledge the unlucky wording of the refusal in its deceptiveness and imperfection. The decision can therefore be considered as incorrect. However, the outcome in the decision is not contrary to the

¹⁵¹ Prop. 1998/99:29 p. 11 f.

¹⁵² Government directive 2004:76, which by the way was brought to a standstill in December, 2005 (Dagens Industri 2005-12-09).

Lottery Act or EC-law according to hitherto case law. Thus, the government's decision should not be reversed based upon the inadequate explanatory statement.

3.5.4 Case Ö 4474- 04

Unibet has questioned the prohibition of promotion of participation and sued the Swedish state for loss of income due to the maintaining of the prohibition. For the first time, the Swedish Supreme Court has referred a gambling case to the ECJ

In March 2003, Unibet was given a leave to appeal¹⁵³ in the Swedish Supreme Court regarding the question to plead the cause of confirmation whether certain Swedish provisions concerning lotteries are incoherent with the freedom to provide services according to article 49 of the Treaty, especially the marketing. The Swedish Court of Appeal had previously dismissed the claim on the plea, based on that a cause of confirmation could not be considered permitted by EC-law.¹⁵⁴ However, the Swedish Supreme Court has referred the case to the ECJ in clearance of the following questions:

1. partly, if EC-law constitutes a right for the companies to a real trial of their claims regarding interlocutory legal protection by the proclamation of non-applicability of Swedish provisions,
2. partly, if EC-law, therefore regarding these interlocutory claims, implies an assessment according to national interlocutory provisions or criterions provided by EC-law,
3. and partly, if, so, which are these EC- criterions.

3.6 *Predicaments of the Swedish Gambling Monopoly – Gambling Companies v. the State*

In the following section, the arguments regarding the Swedish gambling monopoly are divided in three categories: market activities, new products and legislative measures. Each category will be elucidated from both sides. All arguments adduced by the gambling companies will be followed by those of the Swedish state.

3.6.1 Market Activities

A first group of arguments concern market activities and are based on state incomes and its drastic increase as a result from *aggressive marketing*. More than SEK 900 millions was spent last year (2004).¹⁵⁵ ATG and Svenska Spel are marketing themselves in several media by financing Channel 75 and the show "Spelbolaget" in Channel TV4+, main sponsoring the two highest divisions in Swedish football, ice

¹⁵³ Swedish Supreme Court, Ö 752- 05.

¹⁵⁴ Swedish Court of Appeal, Ö 9251- 04.

¹⁵⁵ Marketing costs for Svenska Spel were probably larger during 2004 than for 2005 since it has been adduced that the marketing costs have been decreased during 2005, similar to the levels of 2001, which amounts to SEK 600 millions according to the report from Folkhälsoinstitutet, (2003) p. 57. The marketing costs of ATG were SEK 310 millions, according to the annual report of ATG (2004). Consequently, the total marketing costs amount to more than SEK 900 millions.

hockey and the Swedish national handball team. Overall it has been concluded that the marketing efforts made by the state are of an aggressive manner.¹⁵⁶ The fact that the state did invest large amounts in marketing prior to 2001, when marketing of foreign lotteries were almost non-existent¹⁵⁷, is incoherent with the intentions adduced by the state.

New forms of distribution have continuously made gambling even more accessible, inter alia through grocery stores¹⁵⁸ (3 800 agents), Internet and mobile phones. Svenska Spel's total of 6 300 agents, whereby 3 400 are betting agents, and ATG's total of 2 030 agents have steadily increased during the years.¹⁵⁹ Further, the control is not rigorous as merely 200 controls were conducted on the total of 2 200 situated localities (7 100 gambling machines). During 2004 and 2003, 624 and 598 controls were conducted respectively.¹⁶⁰

The fact is that Sweden has a *gambling addiction* amounting to 2 percent (whereby 0,6 percent are pathological gamblers), while Britain despite their competitive market, albeit very restrictive marketing, only amounts to 1,2 percent. In Britain, for example, marketing through the media of television is prohibited for gambling companies.¹⁶¹

Great sports contribution is emphasized by the state as a cogent reason to keep the monopoly. However, facts show that only 25 percent, of Svenska Spel's total earnings, for 2004 of SEK 4,8 billions, accrued to the sports, constituting merely 1,2 billion¹⁶². Furthermore, the government has earmarked SEK 1,4 billions for 2005¹⁶³, but it is still a *poorly contribution and deceptive* since it is pretended to be more substantial in the public debate. Attention should also be directed to the fact that heavily discounted¹⁶⁴ sponsoring is included in the SEK 1,2 billion-post, which in reality constitutes marketing of state activities. In an open market, implying the existence of more effective companies, the total earnings would be far greater. Hence, the same amount of sponsorship could accrue to sports from the gambling companies, especially as there would be no room for heavily discounts.

Another deceptive fact is that merely 14 million is earmarked for preventing gambling addiction, summing up to 0,46 per thousand of the gambling monopoly's turnover. Contribution in the work against gambling addiction is not even

¹⁵⁶ Concluded in Swedish Supreme Administrative Court, 5819-01, and even in early preparatory work SOU 1992:130 p. 186.

¹⁵⁷ In 2001, all foreign gambling companies together had marketing costs amounting to SEK 4,1 millions while the state's amounted to SEK 450 millions, according to report from Folkhälsoinstitutet, (2003), p. 57 and 59.

¹⁵⁸ ATG's product Harry Boy can for example be purchased in ICA stores around the country, according to annual report of ATG, (2004).

¹⁵⁹ See www.svenskaspel.se and www.atg.se

¹⁶⁰ 2005/06:KrU3.

¹⁶¹ Resumé, (2005-11-30).

¹⁶² Annual report of Svenska spel, (2004).

¹⁶³ Budget proposal for 2005.

¹⁶⁴ Director of communications, Claes Tellman, confirms that the discounts are of large proportions, but were not willing to share the information in details.

comparable to contributions against alcohol and narcotic addictions, albeit their greater social repercussions.¹⁶⁵ Approximately 100 000 have a gambling problem, while approximately 25 000 are pathological, that is, having an addiction. This can be compared to the estimation of 16 000 and 26 000 abusers of alcohol and narcotics respectively.¹⁶⁶ The amounts invested in the work against these addictions are ten folded the amounts invested in the work against gambling addictions.

The *fusion* between Tipstjänst and Penninglotteriet forming Svenska Spel, instead of the proposed transference of Tipstjänst to the public benefit organizations, has evidently shown the disinclination to let the public receive all gambling earnings.¹⁶⁷

Swedish gambling companies¹⁶⁸ have conciliated on *ethical guidelines* regarding marketing, but even ethical marketing has as its objective to encourage and incite gambling; therefore the Swedish state's inducement is an air of ridicule.

The Swedish state is of another opinion in the question of the market activities. Aggressive marketing and new forms of distribution are upheld as a response to the international competition that distorts the Swedish gambling monopoly. These activities cannot serve as evidence for undermining the adduced main objective by the state. Reasonably, in order to canalise the existing gambling demand, one cannot refuse the companies, granted a license, from actively introducing new products, conduct marketing efforts or offer new forms of distribution as these safeguards a higher consumer protection and minimizes the risks of embezzlement.¹⁶⁹ Moreover, marketing costs for outdoor- and television advertisements have been reduced¹⁷⁰ by 20 percent and are back at the levels of 2001.¹⁷¹ The importance of restrictive marketing has been expressed by the government in proposition 2002/03:93 p. 23. Rigorous controls have also resulted in withdrawals of almost 200 token machines from restaurants where gambling has become a too dominating element.¹⁷²

A free market would render a worse statistic concerning the gambling addiction in Sweden. Contrary to the statistic above, official studies have shown the opposite to what the gambling companies are adducing.¹⁷³

The contribution is of vital importance in the public interest and a deregulation of the gambling market would probably lead to deficits and ruin many of the sport organizations around the country.¹⁷⁴ However, this objective is secondary in relation to the public interest, but would not even be an objective in an open market as the

¹⁶⁵ See Appendix D – Subvention of the work against gambling addiction in relation to measures preventing alcohol and narcotics.

¹⁶⁶ Report from Folkhälsoinstitutet, (2003), p. 19.

¹⁶⁷ Prop. 1993/94:243.

¹⁶⁸ Svenska Spel, ATG, Folkspel, A- Lotterierna, IOGT- NTO- lotterierna (Spero) och Swebico.

¹⁶⁹ Fi2004/4965 p. 6.

¹⁷⁰ Annual report of Svenska Spel, (2004).

¹⁷¹ The level of 2001 was SEK 600 millions according to the report from Folkhälsoinstitutet, (2003), p. 57.

¹⁷² Fi2004/4965 p. 6.

¹⁷³ Affärsvärlden, (2005- 11- 24).

¹⁷⁴ SOU 1992:130 p. 178.

surplus only would accrue to shareholders. Moreover, a poll¹⁷⁵ has shown that more than 46 percent think that Svenska Spel's sports contribution is less than SEK 10 millions, while 86 percent guess that it is less than SEK 1 billion. This serves as an evidence of that Svenska Spel's marketing is neither poorly nor deceptive in relation to the perception of the general public.

It is important to bear in mind that it is not the responsibility of Svenska Spel to treat people with gambling problems, but to work preventative and offer consumers the possibility to control their gambling. To compare gambling with alcohol or narcotics is not fair since the latter's greater repercussions. For the year 2005, SEK 14 millions have been earmarked which should be compared to the amounts contributed by the foreign gambling companies and not with the turnover of Svenska Spel.

Regarding the fusion forming Svenska Spel, there were a number of reasons, whereas gaining large-scale benefits were one of the main objectives. A fusion would also result in decreased marketing as only one company would market its products, instead of two.¹⁷⁶

The ethical guidelines, conciliated by the Swedish gambling operators, are more far reaching than any other general consumer protection as far as marketing is concerned, whereby it serves its objective satisfyingly.

3.6.2 New Products

A second group of arguments derive from the manner in which new products have been launched. At present, Svenska Spel offers more than 20 products while ATG offers at least 10 products, see Appendix B and C. The aggressive increase of offers are represented by *more gambling opportunities for each product* (Joker, Kung Keno, Lotto etcetera, see Appendix B and C), but also of *shorter intervals* between bet and payback, and the latter has according to research proven to be the most addictive form of gambling.¹⁷⁷ Other products that have been criticised are Jack Vegas and Miss Vegas, introduced in the 1990s, since their close equivalent; the one armed bandits were abolished in 1978 for being *too addictive*. The opening of the international casinos Cosmopol serves another measure in contrast to the conclusions that quick gambling and gambling in casino environment are two of the most addictive forms of gambling. Further, recently the Swedish government gave Svenska Spel permission to organize Internet poker¹⁷⁸ despite the dissuasion of Folkhälsoinstitutet¹⁷⁹ - to deny its addictive character would be ignorant. By this, Sweden will be the first state lottery to offer online poker. The permit is, however, combined with conditions in respect of its addictive character. According to Douglas

¹⁷⁵ Annual report of Svenska Spel, (2004).

¹⁷⁶ See Prop. 1993/94:243.

¹⁷⁷ Report from Folkhälsoinstitutet, (2003), p. 51.

¹⁷⁸ Press release, Department of Finance, (2005-11-24).

¹⁷⁹ The Opinion on Letter of Referral, Folkhälsoinstitutet, (2005).

Roos (CEO of Ladbrokes), the restrictions imposed on Svenska Spel could easily be complied by the gambling companies, if they were given permission to operate.¹⁸⁰

An argued fact behind the prohibition in § 38 is to obstruct foreign based gambling, since Swedish framework cannot be imposed on them. Notwithstanding this, the existence of *international co operations* enables Swedish consumers to place bets in foreign countries, inter alia, regarding Vikinglotto¹⁸¹ and ATG¹⁸². Therefore, Svenska Spel and ATG are marketing gambling activities organised abroad, but this privilege is solely reserved to them. International horse betting amounts a turnover of SEK 606 millions¹⁸³ whereby SEK 537 millions derive from bets placed in Sweden, which makes it extremely profitable for ATG to run the international pool of betting.

New products are justified by the Swedish state in the same way as the aggressive marketing, which is mainly to enable to face the international competition and the borderless character that gambling has become. One of the assignments of Svenska Spel, imbedded in the permission granted by the government, is to meet existing gambling demands of Swedish consumers, whereby it is inevitable not to offer new products or to introduce international casinos. A gambling responsibility policy was adopted throughout the group of companies during 2004 and a specific staff department was appointed called "Samhälle och ansvar" (Society and responsibility). Concrete measures taken comprise of the enforcement of stake limitations, the gambling card, voluntarily suspensions, registration of personal gambling budget, the possibility to freeze accounts, limited opening hours and the offering of less aggressive products as an alternative to existing products offers. So called sensitive games are imposed an age limit, gambling on credit is being counteracted while healthy gambling environments are being promoted. Every gambling agent, as well as every lottery ticket, has information with the support lines offered by Folkhälsoinstitutet. Regarding casinos, permission granted by the government should clearly express a restrictive marketing of the casinos.¹⁸⁴ In addition, the negative effects of the public health is suppressed by the state by (a) keeping the level of pay back down¹⁸⁵ as well as (b) the number of gambling agents. Internet poker has, by the way, been combined with several conditions in order to secure consumer interests.

3.6.3 Legislative Measures

The third group of arguments comprise of legislative measures, in particular the criminalisation of, as stated in § 54, the prohibition of promoting participation in

¹⁸⁰ Kuriren, (2005- 12- 01).

¹⁸¹ Collaboration with Nordic countries and Estonia.

¹⁸² Collaboration with Norwegian gambling company Norsk Rikstoto, but V75 has been launched in Holland, Germany, Austria and Estonia, according to the annual report of ATG, (2004).

¹⁸³ Annual report of ATG, (2004)

¹⁸⁴ Prop. 1998/99:80 p. 25.

¹⁸⁵ (1) Stryktipset and Måltipset maximum 50 % (2) Lotto maximum 45 % (3) Number games with daily or more frequent draws maximum 55 % (4) Other number games maximum 45 % (5) Oddset maximum 85 % (5) ATG has a permit of 65- 85 %maximum pay back.

foreign lotteries by virtue of § 38, which was removed in the Act of 1994, but later reintroduced and currently valid. As stated before, these provisions do not appear to apply to the state as the international co operations are allowed to exist. In the light of *Gambelli*, the Commission has lodged a complaint stating the criminal offence in § 54 of the Lottery act not to be proportional in relation to its objective.¹⁸⁶

Moreover, § 27 in the Lottery Act discriminates foreign subjects as only state owned companies can be granted permission to organise gambling on token machines.¹⁸⁷ A foreign company owned by the Swedish state would, however appear to, lose its foreign character.

The existence of the Lottery Act has been asserted by the state as sufficient in the work to counteract the economical, social and personal harmful effects of gambling¹⁸⁸. Despite this, risks of frauds and consumers interest are only being described in general terms and not put in a concrete form.¹⁸⁹ It appears as the state presumes foreign organisers of pursuing fraudulent behaviour, but there are no empirical proofs that such behaviour occurs or would occur. Moreover, it would go against any market economic principle to believe that such behaviour would be able to continue to exist in a competitive environment, partly due to legal aspects, partly due to the badwill it would cause. Therefore it cannot be justified to restrict all companies on this ground.

More of a lack of a legislative measure is the negligence of the Public Procurement Act. According to the the state-run Public Procurement Authority, (Nämnden för Offentlig Upphandling), Svenska Spel must abide by the Swedish Public Procurement Act. Nevertheless, Svenska Spel has always decided not to abide by the Act.

In conclusion, there are possibilities for the state to control the gambling and lottery market without excluding other subjects than non profit associations. Numerous of areas exist where private undertakings are allowed to provide services and products, despite the harmful effects it might cause from time to time. In the end, it is evidently shown that the primary reason, for keeping the gambling monopoly, is economical.

In the area of legislative measures, the Swedish state relies on the Swedish Supreme Administrative Court, since it has concluded § 38 of not being in quarrel with EC- law and § 54 was considered proportional to its objective. In addition, *Gambelli* is not applicable to the Swedish measures since there are too vast discrepancies between the measures in question. The reason for which a thorough test of proportionality was assigned in *Gambelli* was due to ECJs doubtfulness whether the Italian measures could be justified by overriding reasons of public interest.¹⁹⁰

¹⁸⁶ COM:s ref SG- Greffe(2004).

¹⁸⁷ Ibid, p. 24.

¹⁸⁸ State defence document T 2417/03.

¹⁸⁹ See prop. 2002/03:93 p.1, SOU 1992:130 p. 99.

¹⁹⁰ F2004/4965, p. 9.

As far as § 27 is concerned, it cannot be considered to discriminate. The wording of the paragraph, and the practise of the same¹⁹¹, is applicable without distinction. The exclusion embraces all commercial operators, domestic, as well as, foreign applicants.

Frauds and other criminal activities are commonly known to be attracted to gambling markets due to the vast amount of money involved. In a debate article¹⁹², Bosse Ringholm (Swedish minister of finance) emphasized that *“risks of fraud and other type of criminality is tackled by, partly police measurements, partly legal framework stating that all gambling activities should be conducted by Swedish undertakings controlled by the state”*.¹⁹³

The Public Procurement Act is not applicable to Svenska Spel's operations. Suppliers considered neglected have the possibility to refer the question to the national Courts, which have the authority to decide how the Act should be interpreted. In the end, it is a question for the ECJ to consider.¹⁹⁴

Conclusion of the state, is that the gambling monopoly is not breaching EC-law. The objective of the monopoly is to supply a healthy and secure gambling market where social considerations are of priority, but at the same time, where the variety of gambling demands is satisfied. Therefore, the market is regulated and activities are privileged to a few number companies without any profit interests. The surplus shall accrue to public interest such as child- and youth organizations, sports and other non-governmental organizations, horse racing industry, culture and public purse.¹⁹⁵ Also, in recent case law the Swedish Supreme Administrative Court concluded Swedish legislation to be coherent with EC-law.¹⁹⁶

¹⁹¹ This amendment was proposed in prop. 1996/97:7, p. 148 and commented as it is “just an adjustment reflecting today's ownership of the gambling companies.

¹⁹² Aftonbladet, (2004-01-13).

¹⁹³ Author's translation.

¹⁹⁴ 2005/06:KrU3.

¹⁹⁵ See prop. 1995/96:169, p. 11, prop. 1998/99:29, p. 7, prop. 1998/99:80, p. 21, prop. 2001/02:47, p. 12, prop. 2001/02:153, p. 10 and 15 and also prop. 2002/03:93, p. 13 and 15 and the Annual report of Svenska Spel, (2004).

¹⁹⁶ Swedish Supreme Administrative Court, 5819-01.

CHAPTER IV

Analysis

4.1 Applicability of an Activity with EC-law

In this chapter, an analysis will be done by an initial outline on how the applicability of an activity, in perspective of EC-law, is conducted, by looking at five questions. This section will elucidate its relevance, as well as impact, and will be explained in the following headlines. The structure for the analysis derives from, the author and attorney at Bar of Brussels, Keuleers' work.¹⁹⁷ The first question derives from the nature of the Treaty, the second from *Schindler*, the third, fourth and fifth questions derive from *Gebhard*.¹⁹⁸

1. Is the activity economic?
2. Is the activity applicable to goods or services?
3. Is the restriction discriminatory?
4. Can the restriction be justified?
5. Is the restriction necessary and proportionate?

Furthermore, European case law, especially *Gambelli* will be elucidated with a clarifying aim. Swedish case law and its legislation will also be analyzed as well as the predicaments of the Swedish framework. In the end, the questions of research for this report will be addressed.

4.1.1 Does the Regulation Concerned Relate to an Economic Activity?

Even if the European integration embraces more than economical fields, it is of paramount importance to examine if a regulation relates to an economic activity, since the Treaty only applies to economic activities, see section 2.2 The Core of the

¹⁹⁷ Keuleers, E. (2003).

¹⁹⁸ Bernitz, U. (2004), p. 452.

European Community. In early EC case law, some Member States advocated gambling of not being an economic activity¹⁹⁹, since lotteries have the character of relaxation and amusement, and not an economic objective as it is based on chance. By virtue of this, ECJ would have been prevented to inquire whether national restrictions were in breach of EC-law. However, ECJ held that it was evident from the facts of the cases, as they were presented to the Court, that the economic significance of gambling activities was considerable in all the Member States. It remarked, by referring to case 13/76 (Doná), that import of goods or providence of services in exchange for remuneration shall be considered as an economic activity as stated in the Treaty. The elements of chance, relaxation and amusement did not prevent the activity from being an economic.²⁰⁰

4.1.2 Does the Economic Activity Relate to the Free Provision of Services or Goods?

It is essential to, albeit not very easy to make, a distinction between goods and services, as referred to in section 2.5 Free Movement of Services and section 2.9.1 Schindler. In the latter section, ECJ considered the activities of sending advertisements and application forms as specific steps in the organization of a lottery, which could not as such be considered as the final objective. Therefore, the activities were considered to fall within the scope of services, and not of goods. ECJ determined the activity by looking at the nature of its principal activity, according to the principle “accessorium sequitur”.²⁰¹ By not considering gambling in the scope of goods, the doctrine of Cassis de Dijon and article 31 of the Treaty do not apply. Gambling, as a service, distinguish itself from a state monopoly of a commercial character, as article 31 of the Treaty aims at protecting suppliers of goods. In the area of gambling, the suppliers are limited due to the nature of gambling as it is provided as a service to the end consumer, and not as a physical product. Moreover, during the last decade, gambling has evolved to be provided virtually as well, which has made its nature even clearer and assignable to the nature of a *service*.

Despite that goods were involved in both the *Schindler* and *Läärä* cases, ECJ considered the activities of being provided for remuneration by an operator to enable persons to participate in a game of chance with the hope of winning. Thus, by virtue of article 50, they had to be considered as services. Furthermore, in *Läärä*, ECJ stated that “(I)n those circumstances, games consisting of the use, in return from money payment, of slot machines such as those at issue in the main proceedings,

¹⁹⁹ C-275/92, *Schindler*, paragraph 16.

²⁰⁰ C-275/92, *Schindler*, paragraph 19.

²⁰¹ Expressed in case law, for example, C-368/95, *Familiapress*, Opinion of Advocate General Tesaurio. The case concerned competitions published in magazines in the form of crosswords or puzzles. As the Court stated, particularly in paragraph 23 of that judgment, such games, organised only on a small scale and for insignificant stakes, do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine.

must be regarded as gambling, which is comparable to the lotteries forming the subject of the Schindler judgment".²⁰²

Contrary to *Schindler*, the *Läärä* slot machines themselves were goods in the strict meaning of article 30 of the Treaty. However, as the Court lacked sufficient information in relation to the effects of the adopted restrictive measure, it was forced to conclude to be unable to answer the question whether the national measure was incompatible with article 30 or not.²⁰³

4.1.3 If there is a Restriction in Place, is it Discriminating?

Member States are only allowed to impose and maintain restrictions provided that no distinction is made on grounds of nationality or residence²⁰⁴, according to article 49 of the Treaty. Therefore, besides its obvious purpose to prohibit direct and indirect discrimination of foreign services, it also serves the purpose of the adoption of non-discriminatory rules to foreign services.²⁰⁵ In *Saeger*, ECJ stated that "*article 49 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services*".²⁰⁶

None of the regulations in *Schindler*, *Läärä* or *Zenatti*, were discriminatory on grounds of nationality. However in *Gambelli*, ECJ held that "*(I)t is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination*".²⁰⁷

4.1.4 Is the Restriction Justified?

A non-discriminating restrictive measure has to be justified by derogations provided in the Treaty. Article 46 of the Treaty provides derogations on grounds of public policy, public security or public health. These are of socio-economic reasons²⁰⁸ and

²⁰² C- 124/97, *Läärä*, paragraph 18.

²⁰³ Ibid, paragraph 23.

²⁰⁴ Bernitz, U. (2004), p. 452 and Meyrowitch, A., Allroth, E. and Hettne, J (2005), p. 54.

²⁰⁵ Case 110/78, *Van Wesemael*; case 279/80, *Webb*, Opinion of Advocate General Slynn; Case C- 154/89, *Commission/France*, Opinion of Advocate General Lenz and Case C- 180/89, *Commission/Italy*.

²⁰⁶ Case C- 76/90, *Saeger*, Opinion of Advocate General Jacobs, paragraph 12.

²⁰⁷ C- 243/01, *Gambelli*, paragraph 71.

²⁰⁸ Meyrowitch, A., Allroth, E. and Hettne, J (2005), p. 67.

shall be viewed holistically, in that they shall all be taken into account, according to case law²⁰⁹.

Cogent reasons expressed by the ECJ are to limit the exploitation of human passion for gambling; curtail the negative social and financial effects of excessive gambling; prevent criminal behaviour as fraud, money laundering and even tax evasion.²¹⁰ Notably, the allocation of profit from gambling activities to charity or other public interest purposes is not without relevance, but cannot serve as a cogent reason.²¹¹

Consequently, the provided freedoms within the EU may be overridden to safeguard the wellbeing of consumers, in particular the recipients of a service, and more generally to guarantee order in society²¹². In *Schindler*, where these arguments were developed for the first time in connection with gambling services, the Court concluded on this point that in the absence of any EC legislation, it was up to each of the Member States to consider what should be appropriate to protect their internal social order²¹³.

Further, it seems as if many of cogent reasons are presumed by the Court to be applicable in all Member States and without any need of elaboration. However, by virtue of most recent case law it seems as the burden of proof may have shifted slightly, see section 4.3.2 A Slight Shift in the Burden of Proof.

4.1.5 Is the Restriction Necessary and Proportionate?

Early case law established that any measure adopted, falling within the scope of derogations, has to be necessary, in order to guarantee the achievement of the intended aim, and proportionate, for example not to go further than necessary.²¹⁴

In the first gambling case, the *Schindler* case, Advocate General Gulmann made following statement reflecting the criteria of necessity and proportionality: “*(T)he decisive questions are thus in my view in any event whether the interest of society invoked by the States are so fundamental that in the area in question they can justify the existing restrictions and whether the rules in question are objectively necessary in order to achieve the objective pursued and are also reasonable in relation to that objective*”²¹⁵.

Advocate General Gulmann did however conclude that it was not possible to identify less restrictive measures for achieving the pursued objectives considering the

²⁰⁹ C-275/92, *Schindler*, paragraph 58. However, Advocate General Gulmann could not preclude that these arguments when considered separately, would not justify the restriction imposed. *Schindler*, opinion of Advocate General Gulmann, paragraph 92.

²¹⁰ Bernitz, U., Kjellgren, A. (2002), p. 230 and Bernitz, U. (2004), p. 460.

²¹¹ C-67/98, *Zenatti*, paragraph 36.

²¹² Joined cases 110/78 and 111/78, *Van Wesemael & Follachio*, paragraph 28; Case 220/83 *Commission/France*, paragraph 20; and Case 15/78, *Koestler*, paragraph 5.

²¹³ C-275/92, *Schindler*, paragraph 61; *Schindler*, opinion of A.G. Gulmann, paragraphs 101-102.

²¹⁴ Joined cases C-369/96 and C-376/96, *Arblade & Leloup*, paragraph 33; Case C-58/98, *Corsten*, paragraph 33; Case C-361/98, *Italy v Commission*, paragraph 33; Case C-228/89, *Gouda*, paragraphs 13-15.

²¹⁵ C-275/92, *Schindler*, Opinion of Advocate General Gulmann, paragraph 79.

unknown implications of an open and competitive gaming sector²¹⁶. Advocate General Fennelly added in *Zenatti* that it was for the national Court to consider whether those two conditions were met²¹⁷. In *Läämä*, Advocate General La Pergola concluded the Finish law, by granting RAY exclusive right on gambling machines, not to meet the criterion of proportionality. But the Court saw it differently and did not follow his opinion. Interestingly, in *Gambelli* the Court concluded, similarly as in *Zenatti*, that “(I)t is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims”²¹⁸. More interestingly, Advocate General Alber did not consider the questions to lie within the discretionary power of the Member State since the objective required for a justification was not cogent due to inconsistent politics and lack of overriding reasons of general interest. It can only be disproportional with a pain of criminal penalties, Alber concluded.

Contrary to *Gambelli* and the Italian provisions, § 54 of the Swedish Lottery Act only considers the organizer of a lottery as unlawful and not the participant. Thus, the frameworks and the circumstances are not easily comparable between Sweden and Italy vis-à-vis *Gambelli*.

It cannot be stressed enough that two different approaches, both can be proportionate in relation to the objective pursued and therefore necessary as well.²¹⁹ Thus, one Member State could prohibit certain gambling activities, while another Member State could advocate a less restrictive regime, for example by granting a limited number of licenses - and both measures could be cogent. Nonetheless, in order to invoke, for example, the protection of consumers to justify a restrictive measure, some legal disposition concerning that objective should be inserted in the legal instrument imposing the restriction; otherwise the restriction as such would not stand the test of criticism.

According to the Swedish government, the reason for ECJ referring the Italian national Court to make a thorough proportionality test, evidently shown in *Gambelli*, was due to the doubtfulness of ECJ whether the Italian measures could be justified by overriding reasons of general interest.²²⁰

National provisions restricting the fundamental freedoms, which are imposed penalties, are subject to a strict test of proportionality.²²¹ In *Gambelli*, Advocate General Alber considered the pain of criminal penalties for merely receiving bets flagrantly in quarrel with the principle of proportionality. Criminal sanction is the outermost remedy only to be used when other remedies or instruments are unable

²¹⁶ Ibid, paragraph 126.

²¹⁷ C- 67/ 98, *Zenatti*, Opinion of Advocate General Fennelly, paragraph 31 - 32.

²¹⁸ C- 243/ 01, *Gambelli*, paragraph 75.

²¹⁹ Weatherill, S. (2006), p. 457.

²²⁰ F2004/ 4965, p. 9.

²²¹ Tridimas, T. (1999), p. 157.

to secure the public interest satisfyingly.²²² The Court, however, delegated the question, giving the national Court discretionary power of assessment. The ECJ has in cases concerning “sensitive” questions (such as gambling) chosen to conduct a limited proportionality test. ECJ has ascertained that since a proportionality test presupposes an analysis of actual and legal considerations pertaining to the circumstances of the Member State in question, the national court is more suitable to conduct this assessment than the ECJ.²²³ A problem arisen from the tradition of referring the case back to the national courts has therefore been the discrepancy in the assessments of equivalent measures.²²⁴ Surprisingly, the Swedish Supreme Administrative Court did not refer the case²²⁵ to the ECJ²²⁶, since no need was concluded. In case of a doubt, a court should refer a case to the ECJ²²⁷. According to the Swedish Court, there was no doubt. European case law (referring to *Schindler*, *Läärä*, *Zenatti* and *Gambelli*) had stated that it is up to the national Court to assess if national frameworks are acceptable.²²⁸

Further, the criteria of proportionality seem to play a less prominent role in the light of EC-law than adduced by SSP in *Gambelli*. When several alternatives are at hand, it lies within the discretionary assessment of the Member State to choose which one, as long as the alternative is not disproportionate considering the aimed objective (*Läärä* paragraph 39 and *Gambelli* paragraph 75).²²⁹ Notably, this is not how the proportionality test is used to be carried out; there is one dimension more. If there are several alternatives, it is not suffice to choose a measure that is not burdensome, it must be the least burdensome available.²³⁰ Its practical effect can be discussed of having little effect in the absence of several alternatives, but the statement is perplexing. This reversed proportionality test, was adduced by the Swedish Supreme Administrative Court when it faced the challenge. But usually, a complete test of proportionality should be done²³¹, which has been advocated²³² in the light of *Gourmet*²³³.

²²² C-243/01, *Gambelli*, Opinion of Advocate General Alber, paragraph 24.

²²³ Hettne, J and Eriksson, I. O. (2005), p. 153-154.

²²⁴ Meyrowitch, A., Allroth, E. and Hettne, J. (2005), p. 58.

²²⁵ Swedish Supreme Administrative Court, 5819-01.

²²⁶ By virtue of art 234 in the Treaty, 3rd section, a question pending before a court or tribunal against whose decision there is no judicial remedy under national law obliges the national court to refer the matter to ECJ. However, empirically, some courts have not accepted this obligation leading to the development of doctrine of Act Clair, whereby if the meaning of a provision is clear, no question of interpretation arises. The recognition of Act Clair was closely related to some Member States' difficulty to accept EC-law as prevailing. ECJ has even expressed acceptance of a reference of new preliminary ruling albeit the existence of a previous interpretation in an identical question. Act Clair concludes the interesting question of when a national court should be obliged to refer a matter to ECJ, but is however not the subject of this paper.

²²⁷ Bernitz, U. (2004), p. 461.

²²⁸ Swedish Supreme Administrative Court, 5819-01 p. 497.

²²⁹ Ibid, p. 8.

²³⁰ Snell, J. (2002), p. 200, de Burka, G. and Craig, P. (2003), p. 816 and Bernitz, U. (2002), p. 115.

²³¹ Bernitz, U. (2003), p. 579.

²³² See Unibet's petition in case T 2417-03 and T 2418-03, p. 91.

²³³ Swedish Market Court, 2003:5 in case B 1/02.

In *Gourmet*, the Swedish state adduced public health to justify prohibition to market alcohol products in periodical magazines. The Swedish Market Court concluded that a large supply of marketed alcohol products already existed in the Swedish society, whereby a prohibition was very little effective in proportion to its objective to prohibit the promotion of participation.

Given the above-mentioned, as there already exists a large supply of marketed gambling- and lottery products, the prohibition in § 38 of the Lottery Act ought to be viewed in the same way – that it has very little effect in proportion to its claimed objective. The Swedish Supreme Administrative Court omitted to do a proportionality test in order to assure the use of a less restrictive measure and still attain the social political objectives. In the light of the *Gourmet* case, a framework with social political objectives should be imposed a proportionality test. An examination of a measure, that might lead to an incarceration of up to two years, should face the same outcome regardless of if it is in the light of being “not disproportionate” (reversed proportionality) or “proportionate” (usual proportionality).²³⁴

4.2 European Case Law

The European case law, prior to *Gambelli*, has clearly shown the chosen path by ECJ - the national Courts were given a vast discretionary power of assessment.²³⁵ However, *Gambelli* forms a dividing line.²³⁶ The aftermath has in some national case law upheld the prior path. Elsewhere, for example in Germany, some Courts have held imposed restrictions incoherent with EC-law in the absence of a consistent gambling policy and, thus, the imposed restrictions could not be maintained, see section 2.10 Aftermath of *Gambelli*. In general, the judgments are rendered by the lower Courts and appeals have been lodged, hence, the legal battle continues.

4.3 Clarifying *Gambelli*

Gambelli is a good example of the truth lying in the eyes of the beholder. On one side, *Gambelli* is being viewed as a prolongation of the Court's history to give discretionary power of assessment to the national Courts, with regards to the compatibility of the EC-law framework of a measure. On the flipside, it is argued that ECJ restricted the margin of appreciation as the scope of interpretation was narrowed to an extent leading the national Court to no other conclusion than implied by the ECJ.²³⁷

4.3.1 Guidelines Narrowing the Scope of Interpretation

Undisputed is the fact that each question was given guidelines. The differences of opinions are composed of how narrow the guidelines should be interpreted. It is, however, a known fact that ECJ often excludes any room for interpretation when it

²³⁴ Wahl, N. (2005), p. 127.

²³⁵ Ibid, p. 119.

²³⁶ Bernitz, U. (2004), p. 458.

²³⁷ Wahl, N. (2005), p. 120.

refers back to the national Courts.²³⁸ The national Courts have the right to formulate their questions, however, ECJ do have the freedom to interpret and even reformulate the addressed question.²³⁹

Analysing the verdict from this point of view gives following at hand: paragraph 70 is a guideline for paragraph 71, paragraph 72 is a guideline for paragraph 73 and paragraph 74 is a guideline for paragraph 75. It can also be advocated in favour of an implied tone within the delegations made in paragraphs 71, 73 and 75.

Regarding the prohibition to discriminate, paragraph 70 states that “...*the restrictions imposed by the Italian rules in the field of invitations to tender must be applicable without distinction: they must apply in the same way and under the same conditions to operators established in Italy and to those from other Member States alike*”.

The delegation in paragraph 71 is expressed by “(I)t is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination.” By virtue of this, the national Courts were given very little to rule upon since it de facto was more easily for Italian operators to organize bets on sporting events, since others were prevented.

On the topic of a proportionality test, in respect of the pain of criminal penalties, paragraph 72 gives the following guidelines: “...*the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate in the light of the Court’s case-law...especially where involvement in betting is encouraged in the context of games organised by licensed national bodies*.” By stating this, ECJ emphasizes the circumstances of the Italian state to encourage gambling whereby it must be considered disproportionate with a criminal penalty imposed on those receiving bets, albeit their lack of permit.

Delegation was formulated in paragraph 73 as “(T)he national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year’s imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State other than that in which those services are offered by making an internet connection to that bookmaker available to bettors at their premises is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments

²³⁸ Bernitz, U. and Kjellgren, A. (2002), p. 154.

²³⁹ See 6/ 64, *Costa/ EN.EL.*, 78/ 70, *Deutsche Grammophon* and 97/ 83, *Melkunie*.

effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events.” In this regard, the ECJ recognizes that the UK established bookmaker is already subject to rigorous controls exercised in his country of establishment by a private audit company and by the Inland Revenue and Customs and Excise. Thus, the requirement duplicates a condition already satisfied and imposes a double burden on the provider of a service, and therefore it cannot be justified.²⁴⁰ Same message is implied in the next statement in regard of the freedom of establishment enlightened by the principle of proportionality.

Concerning the proportionality test relating to the freedom of establishment the Court stated in paragraph 74, *“(A)s to the proportionality of the Italian legislation in regard to the freedom of establishment, even if the objective of the authorities of a Member State is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.”*

Final delegation, in paragraph 75, stated that *“(I)t is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.”*

4.3.2 A slight Shift in the Burden of Proof

Overall it has always been a Member State's obligation to show applicability of the derogations provided by the Treaty.²⁴¹ The ECJ has according to Snell shown a tendency towards conducting, in perspective of article 46 of the Treaty, *“...a fairly robust assessment of suitability and necessity of the national rules”*.²⁴² However, in some areas, considered as sensitive due to their social, political and economic nature, such as gambling, the ECJ have been cautious in their proportionality assessment.²⁴³ It was not until in *Lindman*, the ECJ saw a need for statistical displays. ECJ stated that *“...the referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, a fortiori, the existence of a particular causal relationship between such risks and participation by nationals of the Member State concerned in lotteries organised in other Member States.”*²⁴⁴ Apparently, ECJ lacked reason to assert a correlation between the risks of gambling addiction and other social effects

²⁴⁰ de Burka, G. and Craig, P. (2003), p. 817.

²⁴¹ Bernitz, U. and Kjellgren, A. (2002), p. 203.

²⁴² Snell, J. (2002), p. 218.

²⁴³ Eriksson, I. O. (2003), p. 589.

²⁴⁴ C-42/02, *Lindman*, paragraph 26.

connected to the participation of lotteries vis-à-vis the participation in foreign lotteries.

In this case, it appears as a slight shift in the burden of proof was established. Consequently, it ought to be harder to use, inter alia criminal risks as derogation in those cases the operator is imposed control in his Member State. Considering this, the Swedish state has neither insinuated nor proved any existence of certain risks between foreign lotteries and/or e-gambling and the marketing of them as such.

4.4 *Swedish Case Law*

The Swedish case law is characterized by the unwillingness to trial the Swedish provisions by referring questions to the ECJ, as ECJ's case law has been interpreted in favour of the Swedish provisions and the gambling monopoly. However, Sweden has their own Gambelli case²⁴⁵ now. It is currently pending.

In case, RegR 5819-01, the Court omitted to do a proportionality test. In the light of the above-mentioned considerations and argumentation, there are strong indications pointing towards that such a test should have been made. It would be very surprising if the ECJ would pass the opportunity to give the Swedish national Court guidelines, in accordance with *Gambelli*, and a reprimand concerning the proportionality test. The verdict can be criticised for being a too general collected assessment than a proportionality test in perspective of EC-law. The constructive critic is that the Swedish national court should have separated the parts of the measures that could be considered as disproportional, and further declared these as incoherent with EC-law.²⁴⁶

4.5 *The Lottery Act*

The Swedish legislation makes a distinction between national and foreign subjects, principally shown in paragraphs 15, 27 and 38, but also 17, 19 and 22 by its reference to § 15. §15 states: "*Permits to arrange true lotteries must only be granted to Swedish legal entities that are non-profit associations.*"²⁴⁷

The Swedish framework is advocated by the gambling companies to be discriminating, since Swedish legal entities that are non-profit organizations have the best pre-requisites to be granted a permission to organize a lottery.²⁴⁸ However, the government as well as the Swedish Supreme Administrative Court, argues that there is no difference in excluding, domestic as well as foreign subjects, as long as all commercial parties are enclosed by the wording of paragraph 15, and the practice of the same. Either way, commercial parties are excluded regardless of nationality. The Swedish Supreme Administrative Court commented the question by acknowledging the unlucky wording. However, the measure was not considered as

²⁴⁵ C-432/05, *Unibet*.

²⁴⁶ Hettne, J and Eriksson, I. O. (2005), p. 158, especially footnote 30.

²⁴⁷ Author's translation.

²⁴⁸ Hettne, J (2004b), p. 14.

discriminating since it does not include any negative special treatment of foreign subjects.²⁴⁹ Next question is more interesting - can the discrimination be justified? This will be answered in section 4.6 Answering the Questions of Research.

It appears as the objective is not to discriminate foreign subjects but to exclude all commercial operators. However, the practical effect is discriminating in my opinion, since no foreign subjects are obtaining a permit as it is only given to subjects in solidarity with the Swedish state. In general, it is practically impossible to operate a national monopoly and avoid it to render discriminating effects.²⁵⁰ Crucial for the assessment is therefore if the restriction has actual market effects through the conditions set forth in the practise.²⁵¹ Of secondary importance is if the wording of an Act makes a formal equivalence between domestic and foreign operators, regardless of the intention of the wording.

Main targeted paragraph by the gambling companies is § 38, prohibiting promotion of participation in unlawful lotteries arranged within the country or in lotteries arranged outside the country; marketing that is. The paragraph offers an exemption by which ATG and Svenska Spel have enabled participation abroad with subjects collaborating with them and which have obtained similar permits from their governments. This is startling, in my opinion, but yet again the essence of the question in the view of the Swedish government; commercial lotteries are harmful as opposed to state owned lotteries. But, according to *Gambelli*, a state owned gambling market can be harmful if it incites and encourages gambling to a degree where it is crystallised that the primary objective is financial benefit of the public purse and not the protection of public interest. The cogent reason will be difficult for the State to show.²⁵² In the end, the prohibition can only be maintained if it can be justified by overriding reasons which have been given a proportional design.²⁵³

The state's assignment to supply the Swedish population with gambling can reach a point where it becomes too harmful to justify it. However, not to forget, Sweden, as well as other Member States, joined the EU with the knowledge, and foremost the claim of maintaining the gambling monopoly as well as other monopolies. Thus, this is a political question of highest rank.

4.6 Answering the Questions of Research

The questions outlined in the first chapter of this report will be answered in this section as a concluding section.

First question concerned the law in force within EC and Sweden. By virtue of early case law it was established that (1) gambling is an economic activity that (2) falls

²⁴⁹ Swedish Supreme Administrative Court, 5819-01 p. 8.

²⁵⁰ Allgårdh, O. and Norberg, S. (2004), p. 289.

²⁵¹ Bernitz, U. (2003), p. 577 and case C-243/01, *Gambelli*, Opinion of Advocate General Alber, paragraphs, 93 and 94.

²⁵² Hettne, J. (2004b), p. 15.

²⁵³ Bernitz, U. (2005) p. 208.

under the scope of services and (3) measures restricting gambling cannot be (3a) discriminating, (3b) lawful unless justified by derogations given in article 46 of the Treaty or (3c) lawful unless proportionate in relation to its aim. The Gambelli verdict was clearly in its message, albeit its applicability can be discussed back and forth. Any authority of a Member State inciting and encouraging gambling loses its possibility to invoke public order concerns relating to the need to reduce opportunities for betting in order to justify its restrictive measures. When the Swedish Supreme Administrative Court had the opportunity to refer a case to the ECJ, it chose not to. Swedish case law has merely followed the Gambelli verdict by concluding that Swedish measures are in conjunction with EC-law. However, the financial impact was noticed by the Swedish Court but was not considered as a primary objective of the Swedish framework.

The *second, and its entailed, question* were if the Swedish provisions are in breach of the Treaty and, if so, if they can be justified. It is inevitable for a monopoly to not breach a principle based on free movement of services; otherwise it would not be a monopoly as such. But, the question is vaster than this, and the main question to be answered is if the Swedish provisions can be justified. I believe there to be cogent indications pointing towards incoherence between the Swedish gambling monopoly and EC-law. Assuredly, Sweden did enter the European Union under the claim to maintain its monopoly, and this must serve as a standpoint. But in the light of the message delivered through *Gambelli*, I am strongly questioning the Swedish gambling monopoly and its claimed objectives. It appears as the primary objective for keeping the monopoly is financial. As I see it, the Swedish authorities are inciting and encouraging consumers in the same manner as the Italian authority was doing in *Gambelli*. There are discrepancies between the frameworks, but the circumstances can be compared. In *Gambelli*, Italy was granting concessions to bookmakers, while in Sweden, concessions are given to Svenska Spel and ATG for which they act through their distribution channels. The aggressive nature of the marketing and its pertaining costs can also be compared. The aggressive marketing has been established in preparatory work as well as in case law. The circumstances at hand ought to be in favour of the gambling companies in the referred case to the ECJ. However, the political impact of the question can neither be forgotten nor denied. One should bear in mind that the Directive on Services is expected to be harmonised before 2010. On the whole, one hears from Brussels that a liberalisation of the market is intended by 2008.²⁵⁴

The *third and fourth questions* regard under what circumstances the monopoly could continue to exist and what could undermine the monopoly. New technologies, and foremost the Internet, have enabled new products and new distribution channels. New products and distributions (*read accessibility*) are presumed more addictive as their aim is to give the most leverage for the gambling companies, including the state owned. Therefore, it is of highest importance for Svenska Spel to have restrictive marketing and not to act as a follower of the gambling companies'

²⁵⁴ ISA- CASINOS worldwide casino guide, (2005- 02- 28).

products. Some products should be considered as too addictive for Svenska Spel to offer, but it appears as Svenska Spel does not hesitate to offer even the most addictive products. Products already existing on the market are safer operated by Svenska Spel is their opinion.

It appears as the same circumstances nurturing the monopoly, on the flip side, is undermining it. Thus, to safeguard the monopoly, marketing should be decreased, the pain of criminal penalties should be abolished and a more restrictive stand should incorporate the operation of new products such as online poker and gambling via mobile phones. Moreover, as indications are pointing towards incoherence between Swedish provisions and EC-law, the Public Procurement Act ought to be reviewed, as well as the practise of the same, in order to enable for private operators to offer their services under comparable circumstances.

In a future alternative framework, the legislation should be formed in manner which enables rational and cogent reasons.²⁵⁵ The wording in the provisions should be clear – if the intention is not to discriminate foreign subjects. The provision ought to have another wording, in example that it excludes commercial operators from the market and not foreign.²⁵⁶ Marketing should be allowed to all gambling operators regardless of place of establishment, as the current order appears disproportional. Further, the procedure for granting concessions could safeguard the intended aims by having fixed winning percents and it ought to be possibly to find a way to allocate earnings for the benefit of sport organizations.²⁵⁷

In conclusion, it appears as the operation of Svenska Spel increases gambling and not the opposite. Under these presumed circumstances, the current monopoly order cannot be considered as effective and appropriate to its purpose - to decrease gambling. The prohibition of promoting participation in lotteries, in § 38 of the Lottery Act, therefore appears inefficacious since advertising via television from foreign gambling companies seems unstoppable as they are broadcasted from countries not imposed Swedish provisions (channel 3 and channel 5 broadcasted from Great Britain). The meaning the discretionary power of assessment given to the Member States does not exclude the chosen measure from being imposed appropriateness and necessity in proportion to a legitimate aim. Principle of proportionality constitutes a fundamental principle of EC-law, whereby national courts should be imposed to conduct a proportionality test where the real effect of the national measure is tested, that is if it contributes in a consistent and systematic manner to decrease gambling opportunities and limit gambling. Such assessment must reflect the actual appearance of the Swedish gambling market, in which there is a high supply of gambling products and high exposure of marketing despite of, or thanks to, the monopoly. The objective of Svenska Spel and the Swedish state appears to be to strengthen the competitiveness and not to suppress the supply of gambling.

²⁵⁵ Hettne, J (2004b), p. 16.

²⁵⁶ Meyrowitch, A., Allroth, E. and Hettne, J (2005) p. 88.

²⁵⁷ Hettne, J (2004a), p. 606.

5 List of references

Literature

- Allgård, O. and Norberg S., *EU och EG-rätten*, third edition, Norstedts Juridik, Stockholm, 2004
- Bernitz, U., *Svensk och europeisk marknadsrätt 1 - konkurrensrätten och marknadsekonomins rättsliga grundvalar*, Norstedts Juridik, Stockholm, 2005
- Bernitz, U. and Kjellgren A., *Europarättens Grunder*, second edition, Norstedts Juridik, Stockholm, 2002
- de Búrca, G and Craig, P., *EU law: text, cases and materials*, Oxford University Press, New York, 2003
- Faull, J and Nikpay, A., *The EC-law of competition*, Oxford University Press, New York, 1999
- Hettne, J and Eriksson I. O., *EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, Norstedts Juridik, Stockholm, 2005
- Korah, V., *An introductory guide to EC Competition law and practise*, seventh edition, Hart Publishing, Oxford, 2000
- Snell, J., *Goods and services in EC law - a study of the relationship between the freedoms*, Oxford University Press, New York, 2002
- Steiner, Jand Woods, L., *Textbook on EC Law*, eight edition, Oxford University Press, New York, 2003
- Tridimas, T., *The general principles of EC-law*, Oxford University Press, New York, 1999
- Weatherhill, S., *Cases and materials on EU law*, seventh edition, Oxford University Press, New York, 2006

Articles

- Affärsvärlden, *Storbråk kring pokerbordet*, 2005- 11- 24
- Aftonbladet, *Nej till spelbolag som bara vill tjäna pengar*, 2004- 01- 13
- Ayolt Z., The European Lawyer, *Gambling: A European Legal Perspective*, 2005- 02
- Bernitz, U., Europarättslig tidskrift 6(2003):3, *Gourmet-målet: Marknadsdomstolen finner annonseringsförbud för alkohol otillåtet enligt EG-rätten*
- Bernitz, U., Europarättslig tidskrift 7(2004):3, *Nationella spelmonopol i ljuset av Gambelli-målet*
- Brunker, M., *Britain embraces Internet gambling*, MSNBC (2004)
<http://www.msnbc.msn.com/id/3071035/>
- Dagens Industri, *Douglas Roos: "En rättsskandal"*, 2005- 06- 20

- Dagens Industri, *Sverige beredd att stoppa EU-direktiv*, 2005- 11- 29
- Dagens Industri, *Bosse Ringholm stopper ny spellag*, 2005- 12- 09
- Del Nino, Alessandro, Italy responds to the EC Gambelli case, *Gambling Law Review*, volume 8, number 5, 2004.
- Eriksson, I. O., *Europrättslig tidskrift* 6(2003):3, *Marknadsdomstolens dom i Gourmet-målet: Resonemang kring proportionalitet*
- Fridolin M.R. W., *Internet Gambling Related Regulatory Questions and Enforcement Problems: A Comparative U.S.- Swiss Perspective*, 2000 STAN. TECH. L. REV. 1, 3.
http://stlr.stanford.edu/STLR/Events/gambling/contents_f.html
- Hambach, W., *Betting Law News* 07, www.ra-hambach.com/cms/front_content.php
- Hettne, J., *Europrättslig tidskrift* 7(2004a):4, *EU, Monopolen och försvaret av den rådande ordningen*
- Hettne, J., *Ny Jurdik* (2004b):4, *Har Sverige spelat bort sina monopol? EU och svenska lagstiftningsstrategier*
- ISA- Casinos world wide casino guide, *Interview with Dr. Wulf Hambach*, 2005- 02- 28
www.isa-casinos.de/articles/8260.html
- Keuleers, E., *Remote gaming: The European Legal Perspective*, November 2003
<http://www.gamblinglicenses.com/PDF/ACF15B1.pdf>
- Keuleers, E., *European Gambling Market*, September 2005
www.bettingmarket.com/eurolaw.htm
- Kuriren, *Svenska Spel får ordna pokerspel på nätet*, 2005- 12- 01
- Meyrowitch, A., Allroth, E. and Hettne, J., *EU och svenska monopol – teori och verklighet och framtid*, Svenska institutet för europeiska studier (SIEPS), 2005:6
- Resumé, *Ladbrokes vd: Bosse Ringholm är dåligt påläst*, 2005- 11- 30
- Wahl, N., *Europrättslig tidskrift* 8(2005):1, *Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten? – Regeringsrättens dom i Wermdö Krog*

Annual Reports

Annual report of Svenska Spel, 2004

Annual report of ATG, 2004

Swedish Legislation

Casino Act (SFS 1999:335)

Lottery Act (SFS 1994:1000)

Public Procurement Act (SFS:1992:1528)

Swedish preparatory work

SOU 2000:50, *Från Tombola till Internet*

SOU 1992:130, *Vinna eller försvinna*

Swedish propositions

Prop. 1993/94:243, *Försäljning av AB Tipstjänst till svenskt föreningsliv mm*

Prop. 1994/95:19, *Sveriges medlemskap i den Europeiska unionen*

Prop. 1995/96:169, *Sammanslagning av Svenska Penninglotteriet AB och AB Tipstjänst, mm*

Prop 1996/97:7, *Vissa spel- och lotterifrågor*

Prop. 1998/99:29, *Kriminalisering av främjande av deltagande i lotterier som anordnas utom landet*

Prop. 1998/99:80, *Kasinospel i Sverige m.m.*

Prop. 2001/02:47, *Förnyad riksdagsbehandling av vissa ändringar i lotterilagen (1994:1000)*

Prop. 2001/02:153, *Lotterier över Internet mm*

Prop. 2002/03:93, *Vissa frågor inom spelområdet mm*

Memorial of the Swedish Culture Committee

2005/06:KrU3, *Spel- och lotterifrågor m.m.*

Other government documentation

Government directive 2004:76

Government budget proposal, 2005

State defence document T 2417-03, registration number 3920-03-45, 2004-02-16

Department of Finance

Fi2004/4965, *Överlämnande av svar på formell underrättelse om den svenska lagstiftningen om spelautomater*, 2004-12-15.

Fi2003/6390, *Ansökan om tillstånd att anordna vadhållning m.m.*, 2004-03-18

Opinions on Letters of Referral

Opinion on Letter of Referral, *Yttrande över ansökningar från AB Svenska Spel att anordna lotteri enligt 45 § lotterilagen (1994:1000)*, Folhälsainstitutet, doc.no.: 21-05-0192, 2005-04-14

Petitions

Petition Unibet (London) LTD och Unibet (INTERNATIONAL) LTD ./. Staten, in case T 2417-03 and T 2418-03 brought before Eskilstuna Tingsrätt, 2004-04-02.

Reports

Report from Folkhälsoinstitutet, *Förslag till handlingsprogram för att motverka spelberoende*, reg.nr.: 20-01-0649, 2003-01-07

European documentation

Treaty

Treaty on European Union Official Journal C 325 of 24 December 2002

Directives

Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

European Commission

COM(2000)888 final, Communication from the Commission to the Council and the European Parliament: An Internal Market Strategy for Services, Brussels, 29 December 2000

COM(2002)441 final, Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services, Brussels, 30 July 2002

COM(2004)2 final, The proposal for a directive of the European Parliament and of the Council on services in the internal market (presented by the Commission) [SEC(2004) 21], Brussels, 5 March 2004

COM:s ref SG- Greffe(2004) D/204667, errand number 2001/4826, Letter of formal notice

Written Question, E-2206/05 by José Ribeiro e Castro (PPE-DE) to the Commission

Other

Lisbon, European Council 23 and 24 March 2000, Presidency conclusions
http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm

Press releases

EFTA Surveillance Authority

PR(04)10: *Infringement proceedings initiated against Norway with regard to the introduction of a monopoly for Norsk Tipping on the operation of gaming machines*

PR (04)35: *Norway's gaming machines monopoly is contrary to EEA rules*

European Institutions

IP (91)904, *Gambling and the single market: EC Commission organizes hearings towards year's end*, 11 October 1991

IP (92)1120, *Gambling and the single market: no need for any legislative initiative*, 23 December 1992

IP/ 04/ 401, *Free movement of services: Commission inquires into Danish restrictions on sports betting*, 2004- 03- 30

IP/ 04/ 1227, *Free movement of goods and services: Greece referred to Court over obstacles to importing and marketing games*, 2004- 10- 14

Swedish Department of Finance

Svenska Spel får ordna pokerspel over Internet, 2005- 11- 24

Ladbrokes

Ladbrokes vinner i finländska regeringsrätten, 2005- 06- 10

Case Law

European Court of Justice

6/ 64 Costa/ E.N.E.L., Rec.1964,p.1141, 15/ 07/ 1964

78/ 70 Deutsche Grammophon/ Metro SB, Rec.1971,p.487, 08/ 06/ 1971

13/ 76 Doná/ Mantero, Rec.1976,p.1333, [14/ 07/ 1976](#)

15/ 78 Société générale de banque alsacienne/ Koestler, Rec.1978,p.1971, 24/ 10/ 1978

110/ 78 Ministère public and others/ Van Wesemael, Rec.1979,p.35, 18/ 01/ 1979

111/ 78 Follachio, see case C- 110/ 78

279/ 80 Webb, Rec.1981,p.3305, 17/ 12/ 1981

97/ 83 Melkunie, Rec.1984,p.2367, 06/ 06/ 1984

220/ 83 Commission/ France, Rec.1986,p.3663, 04/ 12/ 1986

C- 202/ 88 France/ Commission, Rec.1991,p.I- 1223, 19/ 03/ 1991

C- 154/ 89 Commission/ France, Rec.1991,p.I- 659, 26/ 02/ 1991

C- 180/ 89 Commission/ Italy, Rec.1991,p.I- 709, 26/ 02/ 1991

C- 288/ 89 Stichting Collectieve Antennevoorziening Gouda/ Commissariaat voor de Media, Rec.1991,p.I- 4007, 25/ 07/ 1991

C- 76/ 90 Saeger/ Dennemeyer, Rec.1991,p.I- 4221, 25/ 07/ 1991

C- 320/ 91 Criminal proceedings against Corbeau, Rec.1993,p.I- 2533, 19/ 05/ 1993

C- 19/ 92 Kraus/ Land Baden- Württemberg, Rec.1993,p.I- 1663, 31/ 03/ 1993

- C- 275/ 92 H.M. Customs and Excise/ Schindler, Rec.1994,p.I- 1039, 24/ 03/ 1994,
- C- 393/ 92 Gemeente Almelo and others/ Energiebedrijf IJsselmij, Rec.1994,p.I- 1477, 27/ 04/ 1994
- C- 55/ 94 Gebhard/ Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Rec.1995,p.I- 4165, 30/ 11/ 1995
- C- 368/ 95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH/ Bauer Verlag, Rec.1997,p.I- 3689, 26/ 06/ 1997
- C- 376/ 96 Leloup, see case C- 369/ 96
- C- 369/ 96 Arblade, Rec.1999, p.I- 8453, 23/ 11/ 1999
- C- 124/ 97 Läära and others, Rec.1999,p.I- 6067, 21/ 09/ 1999
- C- 58/ 98 Corsten, Rec.2000,p.I- 7919, 03/ 10/ 2000
- C- 67/ 98 Zenatti, Rec.1999,p.I- 7289, 21/ 10/ 1999
- C- 361/ 98 Italy/ Commission, Rec.2001,p.I- 385, 18/ 01/ 2001
- C- 6/ 01 Anomar and others, Rec.2003,p.I- 8621, 11/ 09/ 2003
- C- 100/ 01 Oteiza Olazabal, Rec.2002,p.I- 10981, 26/ 11/ 2002
- C- 243/ 01 Gambelli and others, Rec.2003,p.I- 13031, 06/ 11/ 2003
- C- 42/ 02 Lindman, Rec.2003,p.I- 13519, 13/ 11/ 2003
- C- 338/ 04 Placanica, pending case
- C- 432/ 05 Unibet, pending case

Swedish Market Court (MD)

Swedish Market Court 2003:5 in case B 1/ 02, 2003- 02- 05

Swedish Supreme Administrative Court (RegR)

Case number: 5819- 01, 2004- 10- 26, RÅ 2004 ref 95

Case number: 7119- 01, 2004- 10- 26, RÅ 2004 ref 96

Case number: 3841- 04, 2005- 02- 10, RÅ 2005 ref 1

Swedish Supreme Court (HD)

Case number: Ö 4474- 04, 2005- 11- 28

Case number: Ö 752- 05 (leave to appeal – prövningstillstånd), 2005- 03- 03

Swedish Court of Appeal

Case number: Ö 9251- 04, 2005- 01- 26

Other National Courts

Hessischer Verwaltungsgerichtshof in Kassel, verdict 9 February 2004, notation AZ:11TG 3060/ 03, regarding arrangement of sporting bets to Britain.

The German Federal Constitutional Court, Case number: 1BvR 1054/ 01

Italian Court of Cassation, Ruling no. 23272 of May 18, 2004

Contacts

Chief Information Officer, Andreas Jansson, 2005- 11- 08 (Svenska Spel)

Director of Communications, Claes Tellman, 2005- 11- 08 (Svenska Spel)

Internet Websites

www.svenskaspel.se

www.atg.se

www.lotteriinsp.se, *Statistic table from Lotteriinspektionen*, 2005- 03- 22

www.ladbrokes.se, *Ladbrokes vinner i finländska regeringsrätten*, 2005-06-10

Appendix A – Dispersion of the Swedish gambling and lottery market

Dispersion of the Swedish gambling and lottery market, which for year 2004 amounted to SEK 36,5 billion.²⁵⁸

Year	Turnover (MSEK)	Earning
1999	31 505	8013
2000	32 185	8206
2001	33 261	8277
2002	35 108	8376
2003	36 197	8525
2004	36 553	-
2005	-	-

Table 1 – Dispersion of the Swedish gambling and lottery market during the years 1999- 2004

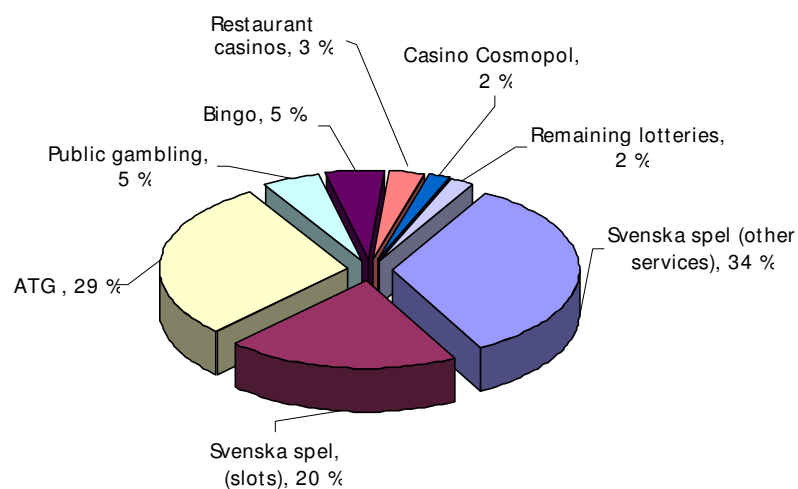


Chart 1 - Dispersion of Swedish gambling market (2004)

²⁵⁸ Statistic table from Lotteriinspektionen, 2005- 03- 22.

Appendix B – Products offered by Svenska Spel

1897	Penninglotterier	1993	Italienska Stryktipset
1926	A monthly draw	1993	Viking Lotto
1977	Two monthly draw		1- 5- and 10- weeks
1992	A scrape	1994	Skrap- Bingo
1934	Stryktipset	1995	Lotto Express (18- year age limit)
	Tips- SM (national championship)	1996	Skrapppyramid
1954	Dramatenlotteriet	1996	(Jack Vegas)
1970	Nummerlotteriet	1996	(Miss Vegas)
1980	Lotto	2000	Greyhound racing
	Wednesdays 2 draws,		Enkel 3, Dubbel 3, on weekends
	Saturdays 2 draws		Vinn 3: daily
	1- 5- and 10- weeks		Vinn 8: Sundays
	2002 Lotto with Joker gives extra winning chance	2002	Sunday Bingo
1983	Måltipset	2003	Tia
	1- 5- and 10- weeks	2003	Lördagsgodis
1984	Joker	2003	Sportbagen
	Together with Lotto, Stryktipset, Italienska stryktipset, Måltipset	2003	Brasilianska stryktipset
1986	Oddset (18- year age limit)	2004	Europatipset
	Bomben, Stubinen	2004	Skraplabyrint
	Lången	2004	Skrapkarta
	Matchen	2004	Pick'n'Click
	Mixen (Internet)		Trekortspoker
	Toppen		Straffspark
1986	Triss		Tärning
	2003 double triss		Diamantjakt
	TV- scrape, monthly winnings		Hjärter dam
1992	Keno		Yatzy

Appendix C – Products offered by ATG

	V5
1987	Dagens Dubbel
1993	V75
1993	Harry Boy
1994	V3
1999	V65 (V64 1999- 2003)
2001	Trio
	Vinnare och plats
	Raket
	Komb
2004	Tvilling

Besides from the products listed above, ATG is participating in and offering an international gambling pool, which turnovers SEK 606 millions whereby SEK 537 millions derive from bets placed in Sweden making it extremely profitable for ATG.²⁵⁹

²⁵⁹ Annual report of ATG (2004).

APPENDIX D – Subvention in the work against gambling addiction in relation to measures preventing alcohol and narcotics

The government has since 1997 earmarked funding to the Public Health Institute (FHI) in order to suppress gambling addiction.

Year ²⁶⁰	Kkr
1997	2 000
1998	2 000
1999	4 000
2000	4 000
2001	6 000
2002	4 000
2003	9 000
2004	14 000
2005	13 900
2006	15 000

Table 2 – Subvention of gambling addiction

Subventions in the suppressing work against addiction of alcohol and narcotics.²⁶¹

Year	Kkr
1997	65 000
1998	95 000
1999	100 000
2000	93 500
2001	85 200
2002	302 500
2003	193 250
2004	153 250
2005	350 000
2006	-

Table 3 – Subvention of alcohol and narcotic addiction

²⁶⁰ See government's budget proposals for the years concerned.

²⁶¹ The subventions have not been separated from each other in the government's budget proposals.

